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**The standard of knowledge for command responsibility
in international criminal law**

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Abstract: By referring to succession, we establish the methodological framework that identifies customary international law, which focuses on certain elements connected to custom and state practice of the *opinio juris*. The application of this framework to a command responsibility framework is based on a customary law norm that determines the level of knowledge of such a command. The practice relating to the level of knowledge of command responsibility is articulated and connected to a legal standard that binds the state (*opinio juris*). Some states, such as the United States, the United Kingdom, Germany, Australia, Israel, and South Korea, with common and civil law legal systems, address questions of command responsibility according to different circumstances. Such states provide a significant example of the degree to which information is provided on the current legal situation as well as on the issue that examines and evaluates the customary norm

governing *mens rea* and command responsibility. A qualitative investigation is sufficient to demonstrate state practice and the *opinio juris* within this context. References to other behaviors related to command responsibility focus on and are connected to international jurisprudence. The behavior of each state worldwide is a subsidiary source for judicial decisions. The relevant judicial bodies seek and hold commanders accountable for actual or presumed knowledge of crimes committed by subordinates. The forums involve cases with universal jurisdiction at the International Criminal Court (ICC). Comparative application with other previous tribunals, such as the *ad hoc* criminal tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR), demonstrate the application of a legal standard that goes beyond customary international criminal law, which carries a cost burden in practice that should have been avoided. Even presumed knowledge does not reflect or form part of the rules of customary international law and cannot be applied to cases of command responsibility. Applying the standard of actual knowledge is consistent with existing law and avoids the costs that arise from applying a legal standard that, in this case, is incorrect.

Keywords: customary international law; command responsibility; international criminal law; International Criminal

Court; *means rea*; Australia; knowledge.

Introduction

On the international stage, wars are numerous, and the evidence and argument of command responsibility for crimes committed by subordinates always creates legal issues and ongoing debate. It is not surprising that, from a criminal standpoint, commanders have faced trial and the loss of life and liberty for atrocious crimes attributed to them despite the crimes being directly committed by their commander.

One recalls the case of General Yamashita after World War II, who was convicted by an *ad hoc* American military commission in the Western Pacific for war crimes committed by his subordinates in the Philippines (Parks, 1973; Cherif Bassiouni, 2013; Walsh, Berry, 2016).¹

One recalls the dissenting opinion of judge Rutledge who stated in this regard:

“(...) tradition needless to say is no less than my own (...) petitioner has had the fair trial our Constitution and laws command (...) occurred with their measure, i am forced to speak (...) we shall not forsake in any case, whether Yamashita’s or another’s, the basic standards of trial which, among other guaranties, the nation fought to keep (...) military justice shall not, alone among all our forms of judging, be above or beyond the fundamental law or the control of Congress within its orbit of authority, and that this Court shall

¹US, Supreme Court: in re Yamashita, 327 U.S. 1 (1946): <https://supreme.justia.com/cases/federal/us/327/1/> Accessed on 24.09.2025.

not fail in its part under the Constitution to see that these things do not happen (...)” (Ferren, 2003).

The observations on command responsibility are exceptional and linked to a legal concept that is part of international criminal responsibility. The debate, application, as well as the certainty and modality of this type of responsibility, seem indispensable in international criminal law and in customary international law.

Towards the path to building command responsibility

When discussing the path toward command responsibility, one notes the conventional formula for criminal charges, which includes a two-pronged test. This test includes the defendant having committed a specific conduct prohibited by law (*actus reus*) and a conduct of a mental disposition (*actus non facit reus nisi mens sit rea*) (Ambos, 2012).

The most general form is homicide, which also includes a physical act resulting in the victim's death, accompanied by a mental state of intent that ends the victim's life by causing serious physical injury (Fletcher, 1998; Hrnčirik, 2006; Nersesian, 2006).

Most cases involve command responsibility, while also including other avenues, such as crimes attributed to the commander who committed them and the commander who did not directly participate in the execution of the conduct that led to

the related crimes.²

Traditional criminal law constructs command responsibility in a sometimes irregular manner (Triffterer, 2016).³

It is not only a direct physical act that is linked to the command responsibility between the commander and the crime but also a criminal responsibility that falls to the principal perpetrator and then to his subordinates (Liakopoulos, 2019; Liakopoulos, 2024).⁴

From a legal perspective, this connection encounters doctrinal and jurisprudential divergences. From a doctrinal perspective, command responsibility sometimes has to do with the measures that the commander should take to repress his own conduct that is incorrect (Marston, Martinez, 2005).

Often, according to the modalities that these crimes present, we speak of command responsibility which invokes a broad discussion on the authority that connects the commander with

218 U.S.C. § 1111 (2003): <https://www.law.cornell.edu/uscode/text/18/1111> Accessed on 24.09.2025. R v. Woollin, (1999) 1 A.C. 82 (H.L.): <https://www.lawteacher.net/cases/r-v-woollin.php> Accessed on 24.09.2025.

³Trial of Tomoyuki Yamashita, U.S. Military Commission, 8 Oct. –7 Dec. 1945, 4 Law Reports of Trials of War Criminals, 2–3 (1948).

⁴Prosecutor v. Bemba Gombo, ICC-01/05-01/08-3636-Anx1-Red, Dissenting Opinion of Judge Mmasenono and Judge Hofmański, par. 41–49 (8 June 2018): “(...) president and commander-in-chief of the Mouvement de liberation du Congo (Movement for the Liberation of Congo) was indicted with war crimes and crimes against humanity allegedly committed in the Central African Republic in the years 2002-2003 (...) attempt to curtail a military uprising against the regime (...) crimes to Bemba on the basis of command responsibility. After being convicted in trial court, Bemba was acquitted of all charges in an appeal judgment which focused on the measures that he could (or could not) reasonably have taken to address the acts of his subordinates (...)”.

his subordinates.⁵

The legal debate raises issues and themes of *mens rea*, as well as issues concerning the necessary causal link between the commander and the main criminal acts committed against subordinates (Damaška, 2001; Martinez, 2007; Ohlin, 2021).

What matters is knowledge. The knowledge that commanders are held responsible for acts that are not based exclusively on the authoritative duties of those under their command, and the lack of knowledge that negates responsibility for crimes committed by their subordinates.

The discussion focuses on whether those under their command are held responsible for crimes of which they are aware, thus approaching the *lex ferenda* and the legal norm that is presumably desirable as the prevailing and even current legal norm (*lex lata*) (Robinson, 2020).

The discussion progresses to international law, with the primary objective of combating impunity and protecting the fundamental rights of the accused, as well as procedural and judicial procedures. Judicial bodies thus apply command responsibility

⁵Prosecutor v. Delalić et al., Case No. iT-96-21-A (the Čelebići Case), Judgment, parr. 186–199 (International Criminal Tribunal for the Former Yugoslavia 20 February 2001): “(...) Yugoslav People’s Army allegedly committed against detainees in the Čelebići camp in Bosnia and Herzegovina, including murder, sexual assault, and torture (...) accused held command positions in the camp during the events and were convicted of war crimes. Delalić was a coordinator of Bosnian forces in the region and later a commander of a tactical unit within the Bosnian army; he was acquitted of all charges due to lack of knowledge and control of the criminal activity (...)”.

by paying attention to the legally based situation, so as not to confuse existing law with aspirational law.

At this point, we can propose a related reference to the *lex lata*, which concerns knowledge of a normative framework for command responsibility in international criminal law. The international legal criterion, which prevails over actual knowledge, is focused on command responsibility, which is an integral part of the lack of sufficient support for the extension of the criterion of constructive knowledge. This demonstrates the modality of a broad and constructive responsibility that constitutes the necessary force to create a binding norm of customary international law.

The legal policy that encourages national and international judicial bodies to apply the right to actual knowledge applies to the involvement of a foreign national in a judicial proceeding that involves international relations and its consequences within the scope of a country's state sovereignty.

The criterion of knowledge that forms and proceeds with the arrest of a foreign national is an unfounded criterion in international law. Indeed, it constitutes an internationally unlawful act that is equivalent to an unlawful intervention comparable to the use of force.

Judicial bodies seek to minimize the risk of applying actual knowledge as a criterion of guilt, which is rooted in a

framework identifiable in customary international law. A judicial process within a solid legal framework demonstrates and promotes the credibility and legitimacy of a judicial process in the face of much criticism and doubt.

Insights from the normative framework of customary international law

When we speak of command responsibility, we mean customary international law, which constitutes one of the fundamental pillars for identifying legal norms that bind the conduct of states.⁶ Command responsibility defines the boundaries of a legal field that entails criminal liability.

A customary standard is established identifying the *mens rea* of command responsibility. The attribution to customary international law suggests customary standards based on consolidated and widespread state practice, including legislation and directives emanating from national jurisprudence, which address the issue of one's own knowledge.

Independent proof of *opinio juris* and awareness meet a legally required standard of knowledge. Adherence to a treaty that specifically establishes a standard that will be important and sufficient to demonstrate state practice is the *opinio juris* that contradicts and prevails over the standards of one's own treaty.

⁶Continental Shelf (Libya v. Malta), Judgment, 1985 I.C.J.13, par. 26 (3 June).

These are standards also addressed in the ICC Statute in Article 28.

Identifying customary law through Art. 38 of the Statute of the International Court of Justice

The notion of command responsibility manifests itself in various ways at the national level and at a framework that considers international criminal law as an indivisible element.

Binding norms govern command responsibility and are part of the fundamental sources of international law (Liakopoulos, 2019b).⁷

Codification through Article 38 of the Statute of the International Court of Justice (ICJ) includes international conventions and customary law as primary sources of international law and as “general principles of law recognized by civilized nations” (Grant, 2010; Crawford, 2012; Meston

⁷U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an international Criminal Court, U.N. Doc. A/CONF.183/C.1/SR.1, at 136–38 (1998): “(...) Article 28 is not the subject matter of this analysis, it is worth commenting that its contribution to the codification or formation of customary law regarding the *mens rea* of command responsibility is unsettled. indeed, the drafters seem to have aimed to incorporate negligence as *mens rea* in Article 28 through the “should have known” formula, presumably based on certain case law of the post-World War II tribunals (...) subsequent developments such as the intriguing way member states incorporated the Rome Statute into their domestic legislation and the ambiguous treatment of Article 28 in jurisprudence of the court (...) suggests that Article 28 was an introduction of a new standard rather than a natural extension of previous standards (...)” reported regulations, statements and decisions refer to one or more singular aspects which later have been defined in Articles 86 and 87 Add. Prot. I 1977, (and in article 28 Rome Statute) none of them offers not even an approximately comprehensive scope and notion of a consistent definition for command responsibility (...).”

Janis, 2017; Roberts, Sivakumaran, 2018; Thirlway, 2024).

Article 38 interprets customary law as “a general practice accepted as law”. The language of Article 38 highlights the absence of an international agreement that refers to nations. Custom is the principal legal source that seeks to shape the obligations and rights of nations and their citizens, as well as interstate relations.⁸

Article 38, paragraph 1, letter d) recognizes:

“(...) judicial decisions and the teachings of the most qualified publicists of various nations, as subsidiary means for the determination of the rules of law (...)”.

This is a contemporary framework of binding norms for command responsibility that requires careful application and exploration of the sources of international law at the current stage and in international custom.

Command responsibility as part of international criminal responsibility has a profile that is implemented in different cases without, however, providing clarity through subsidiary and legal contours that constantly fluctuate over time.⁹

⁸Continental Shelf (Libya v. Malta). It is also well established that even in the face of an existing international agreement, custom continues to serve as an overarching source of obligations between the parties; see Vienna Convention on the Law of Treaties art. 31(3)(c), 23 May 1969, 1155 U.N.T.S. 331; Certain Questions of Mutual Assistance in Criminal Matters (Djib. v. Fr), Judgment, 2008 I.C.J.177, par. 112 (4 June); Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J.14, parr. 172-182 (27 June).

⁹Continental Shelf (Libya v. Malta), op. cit., parr. 26–27.

Identifying a customary norm is not a simple task. National statutory norms and/or legal precedents binding as a customary norm do not pronounce themselves concisely. Customary norms in practice perceive general practice and the acceptance of the law (Sadat, 2018). Custom as a source of law goes beyond the objective of command responsibility in the narrow sense. Fundamental observations contribute to a methodological framework for the analysis of state behavior in relation to command responsibility.

(Follows). The elements of custom

The custom includes two constitutive elements that determine their existence. The first element concerns the general practice of states, and the second the acceptance of states as part of *opinio legis* (Liakopoulos, 2020a).¹⁰

One without the other cannot establish and include customary status, as stated by the International Law Commission (ILC). Practice without acceptance as law (*opinio juris*) is constant and not binding. The two elements establish the existence of a norm of customary international law¹¹ that in practice applies as a

¹⁰Continental Shelf (Libya v. Malta), op. cit., par. 27; Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J.226, par. 64 (July 8); Jurisdictional immunities of the state (Germany v. Italy, Greece intervening), Judgment, 2012 I.C.J.99, par. 55 (3 February); International Law Commission, Report on the Work of its Seventieth Session, U.N. Doc. A/73/10, at 122, 124–26 (2018).

¹¹North Sea Continental Shelf (F.R.G./Den.; F.R.G./Neth.), Judgment, 1969 I.C.J.3, par. 77 (20 February): “(...) only must the acts concerned amount to a settled

standard of knowledge relating to the framework of command responsibility that meets the level of a customary norm to a practice that supports evidence for states applying the standard of law to a legal obligation. *Opinio juris* addresses the evidence relevant to establishing elements within the context of command responsibility.

(Follows). Practice

Turning to practice, we must say that each state is free to implement its own will, objectives, and values through various mechanisms. Thus, some acts are explicit and attributable to their own state, while others have attributed from afar (Baram, 2021).¹²

Acts that demonstrate the determination of the executive, whether in the form of a judicial injunction or, from a legislative perspective, improperly imposed, demonstrate the determination of the executive.¹³ These acts demonstrate a form of practice on the part of a state organ. All of these acts are a consequence of state practice (Liakopoulos, 2020b).¹⁴ We cannot assign

practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it (...)."

¹²Baram affirms that: "(...) Germany's attempt to attribute an election-related cyberattack in 2021 to Russia (...)."

¹³*Biden v. Texas*, No. 21A21 (Sup. Ct. 24 Aug. 2021): "(...) president to reinstate the Migrant Protection Protocols, also known as "Remain in Mexico" (...)."

¹⁴Congressional Review of Agency Rulemaking, 5 U.S.C. §§ 801–808 (2017). *Woolwich Equitable Building Society v. inland Revenue Commissioners* [1993] A.C.

analogical weight to every single act of a state. We must consider the available guidance on state practice. Thus, it is a matter of command responsibility that a state, through relevant guidelines and with respect to prosecution, approves a standard, while the relevant state jurisprudence indicates a different standard. The American example resembles a similar case with the importance of examining overall behavior for a state over time.

Distinguishing practice from the obligation that accompanies it, i.e., *opinio juris*, means that practice is relevant in itself as indicative of the perception of the existence of a legal obligation that implements that practice. Therefore, it is untenable to say that *opinio juris* exists in practice and requires independent proof of the *opinio juris* (Liakopoulos, 2020a).¹⁵

70 (H.L.) par. 265. Kleinwort Benson Ltd. v. Lincoln City Council [1999] 2 A.C. 349 (H.L.) par. 387: <https://publications.parliament.uk/pa/ld199798/ldjudgmt/jd981029/klein01.htm>. Accessed on 24.09.2025. Central Transp. Co. v. Pullman's Palace Car Co., 139 U.S. 24, 59–60 (1891): <https://supreme.justia.com/cases/federal/us/139/24/> Accessed on 24.09.2025. See also ILC Draft Conclusions, op. cit., par. 128: "(...) considering legislation as practice, what may sometimes matter more than the actual text is how it has been interpreted and applied. Decisions of national courts will count less if they are reversed by the legislature or remain unenforced because of concerns about their compatibility with international law. Statements made casually, or in the heat of the moment, will usually carry less weight than those that are carefully considered; those made by junior officials may carry less weight than those voiced by senior members of the Government (...)" ILC, Report on the Work of its Fifty-Third Session, U.N. Doc. A/56/10, at 45-46 (2001).

15S.S. "Lotus," Judgment, 1927 P.C.i.J. (ser. A) No. 10, at 28 (7 Sept.): "(...) judicial decisions to be found among the reported cases were sufficient to prove in point of fact the circumstance alleged by the Agent of the French government (...) abstained from instituting criminal proceedings, and not that they recognized themselves as being obliged to do so; for only if such abstention were based on their being conscious of having a duty to abstain would it be possible to speak of an

The act of competence that authorizes the executive power is a state practice that in practice forms the objectives of custom (Liakopoulos, 2020b).¹⁶

The legislative framework governs the executive *per se* as an expression of a state practice that interprets parts of the judicial and executive powers that decisively influence its own analysis (Liakopoulos, 20201).¹⁷

The role of judicial decisions is evasive in this regard. Art. 38, par. 1, lett. d) of the Statute of the ICJ shows that judicial decisions have a precise and important role as a subsidiary means of determining the law. This also applies to national courts and international tribunals (Ambos, 2021).¹⁸ The relevant decisions can take the form of state practice that impacts the assessment of a state's position when taking a stand on a legal issue (Dinstein, 2007; Ambos, 2021).¹⁹

There seems to be disagreement about the relative weight of the attribution of decisions of courts of different levels

international custom (...) does not allow one to infer that states have been conscious of having such a duty; on the other hand, as will presently be seen, there are other circumstances calculated to show that the contrary is true (...)"'. See also North Sea Continental Shelf (F.R.G./Den.; F.R.G./Neth.), par. 78.

16ILC, Michael Wood (Special Rapporteur), Fifth Report on identification of Customary international Law, 70th Session, U.N. Doc. A/CN.4/717, at 26. Comments from the United States on the international Law Commission's Draft Conclusions on The identification of Customary international Law as Adopted by the Commission in 2016 on First Reading, at 12.

17ICJ, Jurisdictional immunities of the State (Germany v. Italy, Greece intervening), op. cit., par. 55.

18ILC Draft Conclusions, op. cit., par. 149.

19ILC Draft Conclusions, op. cit., parr. 132-133.

(Liakopoulos, 2020b).²⁰ The value of judicial decisions identifies custom, which appears ambiguous in nature.

A judicial decision is examined according to certain precise merits that take into account the factors that influence the value of customary law. Factors that include the value of precedent are in compliance with executive authorities, as well as with the approval and annulment of a decision by its own legislator.²¹

The analysis of state practice shows the central role of domestic judicial decisions, which play and shape state's position on the standard of knowledge relating to command responsibility. An international customary norm arises only in the general practice accepted by its own law. General practice spreads extensively and uniformly in a virtual way (Liakopoulos, 2020a).²² The practice is consistent and presents a pattern of behavior²³ that is

20ILC Draft Conclusions, op. cit., par. 134 and 565: “(...) Decisions of national courts at all levels as state practice, but considering that “greater weight will be given to higher courts”, with jurisdictional immunities of the state (Germany v. Italy, Greece) intervening (...) regarding domestic judicial decisions as important state practice, but specifically for questions of sovereign immunity (...)”.

21ILC Draft Conclusions, op. cit., par. 134.

22ICJ, North Sea Continental Shelf (F.R.G./Den.; F.R.G./Neth.), op. cit., par. 74. Asylum (Colombia v. Peru), Judgment, 1950 I.C.J.266, 276 (20 November). Office of the General Counsel, US Department of defense law of war manual, § 1.8.2– 1.8.2.1 (December 2016). ILC, Michael Wood (Special Rapporteur), Fifth Report on identification of Customary international Law, op. cit., parr. 28-31: “(...) views of the Russian Federation, United States, and israel, according to which the language “virtually uniform” should be adopted in Conclusion 8 of the ILC Draft Conclusions, which concerns the general nature of the practice (...) modified to add the element of consistency in lieu of the language suggested by the rapporteur (...) relevant practice must be general, meaning that it must be sufficiently widespread and representative, as well as consistent (...)”. ILC Draft Conclusions, op. cit., par. 135.

23ILC Draft Conclusions, op. cit., par. 135.

not consistent with the norm of general practice.²⁴

While some states have adopted a standard of knowledge for commander's liability, others endorse a different one. Still other states are undecided about the precise standard of knowledge for incriminating a commander, as well as the position of a group of states that do not adhere to a norm of customary international law.

Acceptance as a law “practice”

A general and uniform practice in itself is not sufficient to establish the existence of a custom. Such a practice is accompanied by and convinces the state that it is obligated to implement it in matters of binding international law and under national law as a voluntary policy taken into consideration.²⁵

A significant number of states address cases of command responsibility based on a standard of knowledge. This standard elevates the norm of customary law to a sufficient number of states that perceive the application of standards as obligatory.

²⁴ILC Draft Conclusions, op. cit., par. 137: “(...) requirement that the practice be consistent means that where the relevant acts are divergent to the extent that no pattern of behaviour can be discerned, no general practice (and thus no corresponding rule of customary international law) can be said to exist (...)”.

²⁵S.S. “Lotus” (Fr. v. Turk.), op. cit., parr. 23, 28. North Sea Continental Shelf (F.R.G./Denmark; F.R.G./Netherlands), op. cit., par. 77; Jurisdictional immunities of the state (Germany v. Italy, Greece intervening), op. cit., par. 55: “(...) point is that the grant of immunity in such a case is not accompanied by the requisite *opinio juris* and therefore sheds no light upon the issue currently under consideration by the court (...)”. Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, op. cit., par. 6; Asylum (Colombia/Peru), par. 286.

Ratifying a treaty by a state that first and foremost respects it is not analogous to a sense of customary obligation that does not in itself reflect the requirement of the *opinio juris* (Villiger, 1997; Thirlway, 2024).²⁶ Some states have decided to adhere to the ICC Statute, which they follow as a legal obligation to adopt the standards as customary law in judicial and legislative practice for states that set a different standard.

A state that has engaged in conventional relations may uphold an emergent legal norm that separates itself from a general customary norm, creating a *lex specialis* that in practice supersedes it.²⁷

The *opinio juris* demonstrates a correct attribution of the expression of the state that presents a position according to a presumed norm. And it is the state that considers the entity in a uniform manner, thus expressing a state of mind that relates to a given norm.²⁸ All state bodies produce declarations inconsistent with the original position.²⁹

26ICJ, North Sea Continental Shelf (F.R.G./Denmark; F.R.G./Netherlands), op. cit., par. 76. Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. U.S.), op. cit., par. 184. ILC Draft Conclusions, op. cit., par. 139, 144: “(...) important that states can be shown to engage in the practice not (solely) because of the treaty obligation, but out of a conviction that the rule embodied in the treaty is or has become a rule of customary international law (...)”.

27ICJ, Ahmadou Sadio Diallo (Guinea v. Democratic Republic of Congo), Judgment, 24 May 2007 I.C.J.582, par. 90.

28Art. 4 of ARSIWA.

29Clayton Thomas et al., Congress Research Service, R46148. CRS reports affirms: “(...) some disparity between statements of the U.S. President and the Secretary of Defense regarding the underlying reasons for the targeting of Soleimani, commander of the Iranian Quds Force, which operated intensively throughout Iraq, among other places (...)”.

The result of a single proclamation issued by a state body is approached with caution and takes into account the circumstances surrounding its proclamation towards an alignment of a state practice together with any subsequent and previous declarations that reflect the position taken by each state.

State practice, juridical opinion, and command responsibility

Every crime includes an element of *mens rea*, a basic concept of criminal law. International criminal law incorporates essential concepts (Pigaroff and Robinson, 2021; Ambos, 2022),³⁰ such as crimes charged within the scope of command responsibility, which possess a mental element of an appropriate nature. This precise content is universal in nature and binding only if it identifies the customary legal norm.

The absence of a customary norm for states is a necessity that highlights the content of the mental element as effective and constructive knowledge. The decision to criminalize behavior that exceeds the boundaries of customary international law conflicts with a concept rooted in international criminal law, that of strict legality.³¹

In the words of Antonio Cassese:

³⁰Art. 30 of the statute of ICC.

³¹Art. 22, par. 2 of Rome statute.

“(...) The principle of strict legality usually implies that national criminal courts (...) do not extend the scope and purport of a criminal rule to a matter that is unregulated by law (*analogia legis*). The same principle applies in (international criminal law) and is prohibited with regard to both treaty and customary rules (...)” (Cassese, 2013).

This means that a customary norm that imposes constructive knowledge, as a mental element of command responsibility, is in conflict with the concept of strict legality, which leaves to the state the restrictive standard of effective knowledge. The question arises whether there is sufficient practice and an *opinio juris* that forms a customary norm that establishes whether the standards are oriented toward effective knowledge.

Practices relating to the scope of command responsibility also include other sources, such as the publication of regulations, guidelines, and policies for criminal prosecution that demonstrate the application of competent authorities, including judicial bodies.³²

Criminal legislation thus enunciates elements of command responsibility, and judges and the executive interpret and apply state practice.³³ An *opinio juris* exists in the declarations attributed to the state articulating what the state perceives as the mandatory standard of its knowledge. The executive thus

³²ICJ, Jurisdictional immunities of the state (Germany v. Italy, Greece intervening), op. cit., parr. 55, 70-71.

³³ICJ, Jurisdictional immunities of the state (Germany v. Italy, Greece intervening), parr. 70-71.

incorporates the declarations into directives, operational regulations, and relevant provisions. States thus globally express presentations on behalf of the state and regarding their legal commitment that adheres to a specific formula of command responsibility.

Opinio juris relates to the standard of command responsibility that is present in the content of legal arguments and in judicial forums. Thus, decisions by state judicial bodies are required to address command responsibility in specific cases. State practice and *opinio juris* through resources enable and lead to a conclusion regarding the standard of appropriate knowledge for a judicial body applying customary international law to a given case (Liakopoulos, 2019c).³⁴

The practice in some states appears to be a non-random selection, encompassing a heterogeneous sample of states with diverse legal traditions and geopolitical contexts, which are driven to consider the application of command responsibility from different angles.

The conclusion and example for states that meaningfully reflect the relevance of command responsibility at the global level is a reality for the evolution of international criminal law.

³⁴ICTY, Prosecutor v. Tadić, Case No. IT-94-I-AR-72, Decision on Defence Motion for interlocutory Appeal on Jurisdiction, parr. 128-137 (International Criminal Tribunal for the Former Yugoslavia 2 October 1995: “(...) state practice and *opinio juris* to determine that internal armed conflicts can invoke individual criminal responsibility for international crimes (...”).

Knowledge standard for approaching and/or removing oneself: The case of the United States

The knowledge standard and command responsibility leave a truly confusing picture. This reality is evident in overall practice in the United States. American criminal jurisprudence has adopted a standard of actual knowledge for executive guidelines that promote a standard of constructive knowledge. These guidelines are tested by their own courts and encounter difficulties in application. The Von Leeb case is a ruling that fundamentally reflects American policy in this area:

“(...) Criminality does not attach to every individual in this chain of command from that fact alone [the fact of crimes committed by subordinates] (...) can occur only where the act is directly traceable to [the commander] or where his failure to properly supervise his subordinates constitutes criminal negligence on his part. in the latter case it must be a personal neglect amounting to a wanton, immoral disregard of the action of his subordinates amounting to acquiescence (...) interpretation of international Law would go far beyond the basic principles of criminal law as known to civilized nations (...)”.³⁵

The responsibility of high-ranking German officers for various crimes, especially war crimes and crimes against humanity,³⁶

³⁵United States v. von Leeb et al. (The High Command Case), 11 Trials of war criminals before the Nuremberg military Tribunals under control council law n. 10, parr. 534-544 (1950): <https://www.legal-tools.org/doc/c340d7/> Accessed on 24.09.2025.

³⁶United States v. von Leeb et al. (The High Command Case), op. cit., : “(...) criminal acts attributed to the accused were “murder, illtreatment [of prisoners of

was a reality even for those officers who did not participate in these types of crimes. The court assessed their criminal responsibility based on the superior role of commanders and the forces perpetrated. The courts dedicated their judgment to the “responsibility of a commander for acts not ordered by him”.³⁷ Regarding the commanders responsible in their occupied territories, the court stated that:

“(...) must have knowledge of these offenses and acquiesce or participate or criminally neglect to interfere in their commission and that the offenses committed must be patently criminal (...)”.³⁸

This statement presents elements that go beyond the criminal nature of the acts themselves, such as knowledge of these crimes that by acquiescence one's participation, criminal negligence one interferes with their commission:

“(...) and it is further pointed out that to establish the guilt of a defendant from connection with acts of the SiPO and SD by acquiescence, not only must knowledge be established, but the time of such knowledge must be established (...)”.³⁹

The court identified with regard to liability in the Von Leeb case that:

“(...) it must be shown both to have had knowledge and to have been connected with such criminal acts either by way of participation or criminal

war], denial of status and rights, refusal of quarter, employment under inhumane conditions (...) other inhumane acts and violations of the laws and customs of war (...)”.

³⁷U.N. War Crimes Comm’n, 12 Law Reports of Trials of War Criminals 74 (1949).

³⁸United States v. von Leeb et al., op. cit., par. 545.

³⁹United States v. Von Leeb et al. op. cit., par. 549.

acquiescence (...)”.

The Von Leeb case was based on actual knowledge and on the analysis of command responsibility. American policy always repeats itself in this case also applying the jurisprudence that has followed over the years.

American policy and command responsibility

Some regulations and directives governing the conduct of commanders in the U.S. armed forces refer to command responsibility as the basis for imposing liability for international crimes committed by subordinates.⁴⁰

The U.S. Armed Forces Criminal Code does not include a specific provision for command responsibility and establishes only one type of liability. There appears to be a certain disparity between the Von Leeb ruling and the American policy, which relies on the foundation of command responsibility. In particular, the U.S. Department of Defense Law of War Manual (DoD Manual) has defined command responsibility as a type of liability for a crime committed by subordinates of the commander (Headquarters, 2019).

⁴⁰United states v. Von Leeb et al., op. cit., par. 547: “(...) acquitted of murder that forces within the area of his command committed, due to insufficient evidence of knowledge or acquiescence (...) sole question then as to such defendants in this case is whether or not they knew of the criminal activities of the Einsatzgruppen of the Security Police and SD and neglected to suppress (...)”.

A manual that recognizes responsibility as attributed to one's commander⁴¹ and does not refer to elements that constitute this type of liability, as it only referred to other sources that have done so.

In August 2019, the United States Department of the Army and the U.S. Marine Corps published a manual that replaced the Commander's Handbook on the Law of Land Warfare (FM 6-27).⁴² This document makes similar statements to those contained in FM 27-10, thus establishing a cognitive construction as a valid basis for attributing responsibility. This is a standard that applies to the commander who has knowledge and reports through other means to his subordinates.

In this regard, FM 6-27 highlighted the commander's criminal liability when he shows:

“(...) personal neglect amounting to a wanton, immoral disregard of the action of the commander's subordinates that amounts to acquiescence in the crimes (...)”.

This formula follows the language we saw in the Von Leeb case regarding the mental element of command responsibility (Eudes, Ryfman, Szurek, 2019; Fleck, 2021; Crawford, Peck, 2024).⁴³

⁴¹Uniform Code of Military Justice (UCMJ), 10 U.S.C. parr. 801-946 and 2441. Van Schaack affirms that: “(...) a statute prohibiting war crimes, but it does not address command responsibility (...)”.

⁴²Department of the Army, FM 27-10, The Law of Land Warfare (1956).

⁴³Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of international Armed Conflicts Art. 86(2), 8 June 1977, 1125 U.N.T.S..

The Department of Defense manual is now a source that addresses the knowledge standard for command responsibility differently.⁴⁴ It refers to responsibility when the commander knew and had the relevant information necessary to conclude the circumstances of the impending crime.⁴⁵ As a source, it refers to a commander who has reason to know that a crime has been committed by one of his subordinates. Thus, it is considered that responsible commanders have their own reason to know and have knowledge of the crimes of their subordinates.

The Manual referred to clarifies and does not explicitly include international legal sources. It perceives the content as a reflection of the general thinking of customary international law, given that the notion is not entirely univocal.

The Manual of the Camp 6-27 definitively proposes and maintains that the legal standard is presented and applied according to international law.⁴⁶ The United States Department of the Army has for years made efforts to establish a perception of a prevailing legal standard in relation to its law enforcement policy.

The document entitled Administrative Investigations & Criminal Law Supplement of the Office of the Judge General Advocate

⁴⁴Statute of the international Criminal Tribunal for the former Yugoslavia Art. 7, S.C. Res. 827 (25 May 1993): “(...) Secretary General report pursuant to par. 2 of S.C. Res. 808 (22 Feb. 1993)).

⁴⁵10 U.S.C. par. 950: “(...) trying “alien unprivileged enemy belligerents” for law of war violations (...)”. See 10 U.S.C. § 948b.

⁴⁶FM 6-27, op. cit., par. 8-31.

addressed command responsibility in times of violations of the laws of war.⁴⁷

The Supplement made precise and direct reference to the Von Leeb case. Explicit reference is also made to the Statute of the International Criminal Tribunal for the former Yugoslavia (ICTY), Protocol I of the Geneva Conventions (Crawford, Peck, 2024), and the Statute of the International Criminal Court (ICC). Its formulation appears to be a standard of liability that is part of the Supplement. It refers to negligence and/or culpability which is understood as:

“(...) a negligent act or failure to act accompanied by a gross, reckless, wanton, or deliberate disregard for the foreseeable results to others (...)”.⁴⁸

A position that has taken as its standard the one established by the Von Leeb case specifying that negligence is equivalent to acquiescence in the case of crimes.⁴⁹

In particular, the Supplement referred to negligence as not sufficient element to demonstrate a violation.⁵⁰ One's own negligence is equivalent to simple negligence, and the American military justice system has identified the lack of due diligence in this regard.⁵¹ Culpable negligence is difficult to prove as

⁴⁷Office of The Judge Advocate General, U.S. Department of Army, Law of War Compliance: Administrative investigations & Criminal Law Supplement (2018).

⁴⁸U.S. Department of army, Pamphlet 27-9, Military Judges' Benchbook 482 (29 February 2020).

⁴⁹United States v. von Leeb et al., op. cit., par. 63.

⁵⁰Law of War Compliance: Administrative investigations & Criminal Law Supplement, par. 7.

⁵¹Military Judges' Benchbook, op. cit., par. 258.

negligence within the scope of constructive knowledge, thus allowing and attributing knowledge to its perpetrator to demonstrate that the perpetrator is aware of an incriminating fact at the moment in these circumstances he realizes the substantial unjustified danger created by his act.⁵²

The Supplement offers the application of culpable negligence and command responsibility. As an example, to a situation in which a subordinate and/or a group has committed his own murder. The Supplement thus orders the commander of that subordinate to commit manslaughter.⁵³ Such a commander is negligent in his duties of supervision regarding the subordinate's behavior, i.e., as a causation between the commander's negligence and the criminal outcome.⁵⁴

The U.S. military appears to be adhering to a standard that aligns with the general concept of culpable negligence and with some modifications resulting from the Von Leeb case. This modification takes into account the expressions “equivalence” and “acquiescence” of one's own crimes, as noted and read in the Von Leeb case, in the instructions of FM 6-27 as well as in its supplement.⁵⁵

⁵²UCMJ art. 119, 10 U.S.C. par. 919.

⁵³Law of War Compliance: Administrative investigations & Criminal Law Supplement, par. 14 and 402.

⁵⁴Military Judges' Benchbook, op. cit.

⁵⁵Law of War Compliance: Administrative investigations & Criminal Law Supplement, par. 7.

Command liability introduces an element that adds culpable negligence to the mens rea, which departs from the traditional scope. Negligence is part of actual knowledge of one's crimes. Definitions of acquiescence include acceptance and/or passive submission such as:

“(...) the act of accepting or agreeing to something, often unwillingly (...) a person's tacit or passive acceptance; implied consent to an act (...)”.⁵⁶

These definitions take into account the presumption that the person partially and knowingly consents to the act he or she includes and consents to. With the exception of the Van Leeb case, in other cases of judicial origin, a similar analysis of command liability applies a standard of actual rather than constructive knowledge.

(Follows). American jurisprudence

The Erhard MILCh case from the Nuremberg Tribunal⁵⁷ was an important starting point for many crimes, as it involved the responsibility and illegal conduct of subordinates. The arguments of overriding legal issues relating to the accusation of experiments and the specific accusation in the MILCh case allow us to consider the dissenting opinion of judge MILCh,

⁵⁶Acquiescence, Merriam-Webster: <https://www.merriam-webster.com/dictionary/acquiescence> (Accessed on 24.09.2025); Acquiescence, Black's Law Dictionary (11th ed. 2019).

⁵⁷United States v. MILCh, 2 Trials of war criminals before the Nuremberg Military tribunals under control council law, n. 10, 355 (c. 1950).

who did not possess culpable knowledge in relation to illegal experiments.

In the Oswald Polh and Others case,⁵⁸ it was accepted that Commander Erwin Tschentscher was convicted of crimes committed by his subordinates in eastern Poland and Ukraine. Regarding his acquittal and actual knowledge, it was stated that:

“(…) There is some evidence that he had constructive knowledge of the participation of members of his command, but absolutely no evidence that he had actual knowledge of such facts (…).”⁵⁹

Regarding the hostage case,⁶⁰ it was demonstrated that the reliance on actual knowledge misconstrued the basis of the criminal responsibility of commanders. Defendant Wilhelm List argued that the murders committed by forces on his territory and under his command were not of his own knowledge. The court rejected the request and ruled that information through reports for the commander constitutes a duty that was not considered as his own defense.⁶¹

⁵⁸United States v. Pohl et al., 5 Trials of war criminals before the Nuremberg Military tribunals under control council law, n. 10, 355 (c. 1950).

⁵⁹United States v. Pohl et al., 5 Trials of war criminals before the Nuremberg Military tribunals under control council law, n. 10, 355 (c. 1950), p. 1011

⁶⁰United States v. List et al. (The Hostage Case), 11 Trials of war criminals before the Nuremberg Military tribunals under control council law, n. 10, 355 (c. 1950), p. 759.

⁶¹United States v. List et al. (The Hostage Case), 11 Trials of war criminals before the Nuremberg Military tribunals under control council law, n. 10, 355 (c. 1950), p. 1271: “(…) knowledge of the contents of reports made to him is not a defense. Reports to commanding generals are made for their special benefit (...) acquaint themselves with the contents of such reports, or a failure to require additional reports where inadequacy appears on their face, constitutes a dereliction of duty which he cannot use in his own behalf (...)”.

The court cases deal with command responsibility, as does the US Supreme Court on the General Tomoyuki Yamashita case.⁶² This is a case with much controversy from the beginning, which explained the tendency of the judges of the tribunal to distinguish cases and jurisdiction according to the ruling in re Yamashita (Reel, 1950; Ferren, 2012).⁶³ A case in which knowledge of the atrocities in their territory was complex and cryptic.⁶⁴

The commission highlighted that the crimes committed by their subordinates in the Yamashita case were systematic and isolated incidents.⁶⁵ Yamashita's state of knowledge was not clarified regarding what his subordinates did or did not do, nor was his conviction decisive (Eckhardt, 1982).⁶⁶

⁶²United States v. von Leeb, par. 544: "(...) U.S. Supreme Court decision in re Yamashita, 327 U.S. 1 (1946) (...) applicable because of differences in the scope of authorities vested in him and in the commanders in the current case (...)". United States v. Pohl, op. cit., par. 1011: "(...) Supreme Court's articulation in re Yamashita of the duty of the commander to take reasonable measures to protect prisoners of war and the civilian population, but concluding that such duty does not apply to the defendant Tschentscher due to his lack of knowledge (...)". United States v. MILCh, op. cit., par. 876: "(...) in re Yamashita 'is not controlling in the case at bar,' because the defendant had a lack of actual knowledge in regards to the inhumane nature of medical experiments he ordered (...)".

⁶³Reel, A.F. (1950). The Case of General Yamashita. Indiana University, Bloomington.

⁶⁴Trial of Tomoyuki Yamashita, op. cit., parr. 4057-4063.

⁶⁵Trial of Tomoyuki Yamashita, op. cit., parr. 4062-4063: "(...) Commission concludes: (1) That a series of atrocities and other high crimes have been committed by members of the Japanese armed forces under your command against people of the United States, their allies and dependencies throughout the Philippine islands; that they were not sporadic in nature (...) Japanese officers and noncommissioned officers; (2) That during the period in question you failed to provide effective control of your troops as was required by the circumstances (...)".

⁶⁶Trial of Tomoyuki Yamashita, op. cit., parr. 4063 and 4057: "(...) to have been permitted by the Accused (...)". Whitney affirms that: "(...) is inevitable that the

American jurisprudence includes examples that convince the use of the criterion of actual knowledge for the assessment of criminal responsibility for war crimes (Solis, 2021). This criterion was not exclusive and reserved for the crimes of the Second World War. But it was applied to the actions of American soldiers. Within this context, the Ernest Medina case and the My Lai massacre (Bigart, 1971) are worth mentioning.

In this case, Lieutenant William Calley attacked the South Vietnamese village of My Lai on 16 March 1968. This was a case of resistance fighters who systematically killed hundreds of people in their own village, including children and women. Captain Medina was the commander of Lieutenant Calley's company and his superior officer.

This command relationship was unusual, as he accused Medina of being the protagonist and instigator of his own murders.⁶⁷ The charges were based on the fact that Captain Medina was aware of the commission of the murders, did not fulfill his duty as commander and did not stop the opportunity he had.

The military judge and the relevant court-martial panel, applying

accused knew about (the atrocities) and either gave his tacit approval to them or at least failed to do anything either to prevent them or to punish their perpetrators (...). Eckhardt affirms that: "(...) Yamashita case reveals that there was in fact credible evidence of knowledge on his part (...)". See in re Yamashita, op. cit., parr. 50-54. According to the dissenting opinion of J. Rutledge: "(...) commission's ultimate findings draw no express conclusion of knowledge (...)". Ford v. Garcia, 289 F.3d 1283 (11th Cir. 2002): "(...) Yamashita case as establishing a standard of 'should have known.' This was a civil case dealing with the application of the Torture Victim Protection Act, 28 U.S.C. § 1350 (...)".

⁶⁷United States v. Calley, [22 C.M.A. 534](#), 536 (1973).

the criterion of commander's responsibility, included actual knowledge as a prevailing criterion. The commander was responsible even if he had actual knowledge and commanded troops for the people under his control, thus committing a war crime without taking necessary measures to ensure compliance with the laws of war.

Legal requirements were imposed on a commander, thus requiring actual knowledge for an unlawful omission (Kenneth, 1973; Hill, 2015; Solis, 2021).⁶⁸ There is a certain disparity between the relevant policy emanating from the Department of Defense and the American legal practice relating to command responsibility.

Policy documents such as the Supplement we have seen promoted a broad standard of constructive knowledge, laying the foundation for American jurisprudence that suggested actual knowledge as a reference standard for the application of one's command responsibility.⁶⁹

(Follows). Case law from the United Kingdom and command responsibility

Another country that has allowed us to judge and reach precise

⁶⁸See the UCMJ Article 77 ("principals") with an involuntary manslaughter charge (UCMJ art. 119(b)(1)).

⁶⁹U.S. Department of Defence, Final Report to Congress: Conduct of the Persian Gulf War 713 (Apr. 1992): "(...) standard of "should have known" to Saddam Hussein as head of the Iraqi military at the time and his responsibility over crimes of Iraqi soldiers against the Kuwaiti civilian population (...)"

conclusions, at least we hope, is the United Kingdom, a common law country that has made a substantial contribution to jurisprudence, especially after the Second World War and the numerous war crimes trials by British military tribunals (Cheah, Vormbaum, 2018). We refer to the Franz Schönfeld case, one of the ten German security police officers accused of killing three airmen.⁷⁰ He was one of the officers responsible for the team's operations, but he was not present at the incident.

The judge explained that the commander had no reasonable grounds to foresee misconduct by his men, and his behavior did not amount to culpable negligence. This terminology implied a standard of constructive knowledge, adding that the officer was responsible and aware of the team's intention to commit murder, thus concluding the observations of actual knowledge.⁷¹

The United Kingdom requested further clarification on the subject of command and the conduct of its forces. This discipline was introduced into the armed forces under the International Criminal Court Act⁷² and fulfilled the United Kingdom's obligations as part of the ICC Statute. In particular,

⁷⁰United Nations War Crimes Comm'n, 11 Law Reports of Trials of War Criminals 64 (1949).

⁷¹See Armed Forces Act 2006, v. 52 (UK), <https://www.legislation.gov.uk/ukpga/2006/52/contents> Accessed on 24.09.2025.

⁷²International Criminal Court Act 2001, v. 17, § 65 (UK), <https://www.legislation.gov.uk/ukpga/2001/17/contents> (Accessed on 24.09.2025); "(...) Rome Statute so explicitly may testify to the state's commitment to the treaty, but it does not-in and of itself-provide evidence of *opinio juris* regarding the customary nature of the rules within the statute (...)".

Article 65, paragraph 2 included what was confirmed by Article 28 of the ICC Statute (Ambos, 2022) and the related responsibility of command.⁷³

The related operative clause established that a commander was responsible for the conduct of his subordinates and that:

“(...) he either knew, or owing to the circumstances at the time, should have known that the forces were committing or about to commit such offences (...)”.

The British courts interpreted the knowledge criterion established under Article 65, paragraph 2 for the specific context of command responsibility. In other areas outside of this criminal law, the expression:

“(...) should have know (...) has the means at his disposal of knowing (...) relevant facts (...) chooses not to deploy it (...)”.⁷⁴

An expression that was equivalent to the expression of turning a blind eye and imposing on the means of knowledge available to the guilty party.⁷⁵ These are interpretations that are subject to a

⁷³United Kingdom, international Criminal Court: Assembly of State Parties to the Rome statute (11 Mar. 2003), <https://asp.icc-cpi.int/states-parties/western-european-and-other-states/united-kingdom> Accessed on 24.09.2025.

⁷⁴Mobilx Ltd. v. Commissioners for Her Majesty's Revenue and Customs [2010] EWCA (Civ) 517, [2010] STC 1436, [52]: <https://www.casemine.com/judgement/uk/5a8ff71460d03e7f57ea7344>, Accessed on (24.09.2025):“(...) “should have known” terminology for participation in fraudulent transactions (...)”. Wilson v. Peter Vassallo Ltd. [1997] UKEAT 86/97/1804, at 2: “(...) dismissal of an employee suspected to have been involved in theft (...)”.

⁷⁵R v. Rimmington [2005] UKHL 63, (39-40):<https://www.lawteacher.net/cases/r-v-rimmington-and-r-v-goldstein.php>, (Accessed on 24.09.2025): “(...) the standard test for a conviction of causing a public nuisance). Notably, the England and Wales Court of Appeals held that the terminology “should have known” is inappropriate for cases of gross negligence manslaughter, in which the court must assess the “reasonable foreseeability of serious

legal context on a case-by-case basis and not as a general rule. And it is difficult to conclude that the application of the expression has anything to do with command responsibility resulting in a standard of knowledge of a constructive⁷⁶ as well as effective⁷⁷ nature.

As can be seen, the evidence was insufficient for judicial application on the subject of command responsibility within the United Kingdom, which expressed its general approach to command responsibility through official publications.⁷⁸

The UK Manual for Armed Conflict codified the perspective that the United Kingdom implemented the law of armed conflict, through the attribution of responsibility to certain transgressive conducts. The UK Manual referred to the responsibility of commanders.⁷⁹

Art. 28 of the ICC Statute (Ambos, 2022) referred to the standard of responsibility that was required and to the fact that the commander knew the circumstances under of which committed the crimes of his subordinates. The UK Manual did not rely on the analysis of Art. 28 of the ICC Statute (Ambos, 2022). But reference was made to the articulations of a required

and obvious risk of death (...)"'. Rose v. R [2017] EWCA (Crim) 1168 [1]: <https://pubmed.ncbi.nlm.nih.gov/29791000/> Accessed on 24.09.2025.

⁷⁶Rimmington, UKHL 63, (39-40).

⁷⁷Wilson, UKEAT 86/97/1804, at 2, or "choosing to ignore" certain facts, Mobilx, EWCA 517 (61), op. cit.

⁷⁸Office of the prosecutor, international Criminal Court, situation in iraq/UK: Final Report: (9 December 2020), parr. 210-212, 239.

⁷⁹UK Manual, op. cit., parr. 16.36, 16.36.3.

standard of knowledge.⁸⁰

The UK Manual did not refer to art. 28 to regulate the standard of knowledge.⁸¹ In the Delalić case, the ICTY also provided a different position on the matter.⁸² The ICTY inserted the interpretation of the formula he had reason to know from the ICTY Statute, also establishing that:

“(...) he had in his possession information of a nature, which at the least, would put him on notice of the risk of such offences by indicating the need for further investigation in order to ascertain whether such crimes were committed or were about to be committed by his subordinates (...)”.⁸³

The lack of interpretative case law and references in the UK Manual gave a confusing impression regarding the alleged application of the ought-to-know criterion, thus assuming the form of actual and constructive knowledge.

It is recalled that the UK during the 2001 Iraq war (Ucko, Egnell, 2013)⁸⁴ provided substantial evidence for national

80UK Manual, op. cit., parr. 16.36.1 and 16.36.2: “(...) art. 7(3) of the ICTY Statute, which requires that a commander “had reason to know” of the criminal acts (...)”.

81UK Manual, op. cit., par. 16.39.3: “(...) the UK will unhesitatingly adopt the jurisprudence of the ICC. Instead, the UK Manual states that “National tribunals will normally be governed by the general principles of law contained in their own domestic legislation although these will undoubtedly be influenced by any international jurisprudence that may exist (...)”.

82UK Manual, op. cit., 16.36.6. Prosecutor v. Delalić et al., op. cit., par. 222.

83Prosecutor v. Delalić et al., op. cit., par. 223, 233, 226: “(...) Neglect of a duty to acquire such knowledge, however, does not feature in the provision as a separate offence, and a superior is not therefore liable under the provision for such failures but only for failing to take necessary and reasonable measures to prevent or to punish (...) that knowledge may be presumed if a person fails in his duty to obtain the relevant information of a crime, but that it may be presumed if he had the means to obtain the knowledge but deliberately refrained from doing so (...)”.

84Community of Counsellors, the report of the Iraq inquiry: executive summary,

mechanisms that supported and respected the laws of armed conflict of the British armed forces.

The UK in Iraq also conducted investigative proceedings before the prosecutor of the ICC.⁸⁵ From a criminal perspective, the proceedings did not have any significant or important consequences.⁸⁶ This means that they did not provide further insights into the area of command responsibility for the UK (Simpson, 2007).⁸⁷

2009-2011, HC 264 (UK).

⁸⁵The Iraq Report, op. cit., par. iX: “(...) 13 May 2014, based on communications the ICC Prosecutor deemed to be credible, she reinitiated a preliminary examination into UK conduct in Iraq in 2003 (the initial examination was terminated in 2006). The prosecutor concluded that there is “reasonable basis to believe that members of UK armed forces committed war crimes within the jurisdiction of the court against persons in their custody (...). Thus, the focus of the prosecutor’s examination was on complementarity, i.e., whether the UK has genuinely investigated credible allegations of war crimes (...) “numerous concerns” the prosecutor found regarding the investigatory process, she eventually concluded that they did not rise to a determination that the UK authorities were unable or unwilling to genuinely investigate alleged crimes (...)”.

⁸⁶The Iraq Report, op. cit., par. 90, 227. R v. Payne, [2007], Sentencing Hearing Transcript 15–17 (30 Apr. 2007): “(...) Corporal Payne to twelve months imprisonment, dismissal from the service, and rank reduction, following his guilty plea for a charge of inhumane treatment (...)”. See also from the ECtHR, Al-Skeini v. United Kingdom, 7 July 2011, par. 99, 168-177. Ministry of defence, service justice system policing review, par. 62-65 (2018). The Iraq inquiry, op. cit., par. 165: “(...) led to the initiation of two major civilian investigative mechanisms: the Iraq Historic Allegations Team and the subsequent Service Policy Legacy investigations, which cumulatively examined thousands of allegations. To date, the examinations have not produced criminal charges (...)”. Iraq Historic Allegations Team, Work Completed: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/649525/20171003-iHAT_NEW_master_copy_website_work_completed_table-HQComms_O.pdf (Accessed on 24.09.2025); Service Prosecution Legacy investigations, Work Completed: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1026579/20210929-SPLi_Work_Completed_Table.pdf Accessed on 24.09.2025.

⁸⁷The Iraq Report, op. cit., par. 210-212: “(...) charged with a military offense of negligent failure to perform their duties, in connection with the death of Baha Mousa,

The legislative status of the UK and the judicial experience within the area of command responsibility was imprecise. The legislature adopted the ICC standard regarding the expression “should have known”, but the executive and judicial bodies did not implement it.

The International Criminal Court Act and the UK Manual introduced variations on command responsibility, and the ICTY adopted a conclusion referring to “putting him on notice”. It was emphasized that the ICC standard related to the phrase “should have known” as an endorsement of constructive knowledge that the UK was able to fully acquire and to remain on standby for future cases.⁸⁸

a receptionist who UK captured and interrogated in Basra, Iraq. The three were subsequently acquitted (...). Simpson affirms that: “(...) the charges were disciplinary in nature and as such are distinguishable from the general form of command responsibility under international criminal law (...).”

88ICC, *Prosecutor v. Bemba Gombo*, ICC-01/05-01/08-3636-Anx1-Red, Dissenting Opinion of Judge Monageng and Judge Hofmański, par. 265 (8 June 2018): “(...) commanders removed from the crime scene are concerned, it will be often difficult to neatly distinguish between knowledge of the (imminent) commission of crimes and the “should have known” standard (...) it is irrelevant for the commander’s criminal liability whether he or she “knew” of the subordinates’ crimes (...) “should have known” of them, there is therefore no reason to require a trial chamber to make a clear distinction between the two standards (...)”. And art. 266: “(...) article 28(a)(i) of the statute establishes, in effect, a unitary standard for the mental element and that the difference between the “knew” and the “should have known” standards has no practical consequence for the purpose of triggering liability under article 28(a) of the Statute (...)”. *Prosecutor v. Bemba Gombo*, ICC-01/05-01/08-3636- Anx2, Separate Opinion of Judge Wyngaert and Judge Morrison, par. 38 (June 8, 2018): “(...) Judges Monageng and Hofmański, suggest, that article 28 of the statute contains a single mental element, which encompasses both the knowledge and should have known standard (...) do not believe this is correct (...) it must be proved that the commander had some information regarding subordinates’ misconduct, and not merely that they neglected to acquire it (...); op. cit., parr. 39, 46: “(...) Judge Eboe-Osui addresses the modes of liability in art. 28(a)(i) as “actual or constructive knowledge,” but does not expand any further on the issue (...)”. *Prosecutor v. Bemba*

The case of Germany

Legislation on crimes in international law had not existed since the beginning of the Second World War, at a time when we have the first *ad hoc* legislation on the matter. The German International Criminal Code included specific provisions addressing the responsibility of a military commander for crimes committed by subordinates.⁸⁹

The provisions were connected to a general framework of German criminal law that was later incorporated into the International Criminal Code, according to paragraph 2 (“Application of the general law: The general criminal law shall apply to offenses pursuant to this Act so far as this Act does not make special provision in sections 1, 3 to 5, and 13 subsection (4)”).

The fundamental principle was of command responsibility. The commander had to assume equal responsibility for atrocities committed by his subordinates. This is a concept that was part of paragraph 4 of the code, which established that he will be punished in the same way as the perpetrator of a crime committed by his subordinate. This is a punishment that falls to

Gombo, ICC-01/05-01/08-3636-Anx3, Concurring Separate Opinion of Judge Eboe-Osuji, par. 257 (June 14, 2018): “(...) the majority opinion itself does not address the issue whatsoever (...)”.

⁸⁹See the Parr. 4 (“Responsibility of Military Commanders and Other Superiors”), par. 14 (“Violations of the Duty of Supervision”), par. 15 (“Omission to Report a Crime”).

his commander, who, according to paragraph 4, is responsible for the crime committed by his subordinate:

“(...) “shall be punished in the same way as a perpetrator of the offense committed by that subordinate (...)”.

This is a provision that remains completely silent. According to paragraph 2, the General Criminal Code prescribed. The German Criminal Code provided in paragraph 2:

“(...) the law expressly provides for criminal liability for negligent conduct, only intentional conduct attracts criminal liability (...)”.

The commander was responsible, according to paragraph 4, for having committed the omission intentionally.⁹⁰ A provision that presupposed actual knowledge of the subordinate's conduct.

The International Criminal Code included separately and criminalized the intentional or negligent failure of the commander to adequately supervise a subordinate who committed an offence in Article 14, paragraph 1.

Regarding the penalty under paragraph 14, paragraph 1 and in relation to failure to supervise, it was reduced and limited to three years. Germany was part of the ICC Statute⁹¹ within a legislative framework regarding command responsibility that was in conflict with the statute and the culpability of a

⁹⁰Strafgesetzbuch [StGB] [Penal Code] 13 Nov. 1998, par. 15, https://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html#p0136 Accessed on 24.09.2025.

⁹¹Germany, international Criminal Court: Assembly of States Parties to the Rome statute (3 Apr. 2003), <https://asp.icc-cpi.int/states-parties/western-european-and-other-states/germany> Accessed on 24.09.2025.

commander. It was commensurate with the subordinate responsible but was not limited *ex ante* by the statute.⁹²

German law thus reserved a more serious form of commander's responsibility, namely an intentional conduct that constituted a mitigated offense (Ambos, 2021).⁹³ The obligations under the International Criminal Code were emphasized in the official guidelines for the German armed forces. The German Law of Armed Conflict Manual and the sections relating to command responsibility also underlined that:

“(...) The German Law of Armed Conflict Manual recites the sections concerning command responsibility and further stresses: “if a disciplinary superior learns about occurrences which justify the suspicion of LOAC [Law of Armed Conflict] violations, he or she must investigate and consider whether disciplinary measures should be taken (...)”.⁹⁴

Case law from Germany has addressed the application of

⁹²Art. 28(a) of ICC statute. Prosecutor v. Bemba Gombo, ICC-01/05- 01/13-2276-Red, Judgment on the Appeal, par. 60 (8 Mar. 2018): “(...) Court’s legal framework does not indicate an automatic correlation between the person’s form of responsibility for the crime/offence for which he or she has been convicted and the sentence, nor does it provide any form of mandatory mitigation in case of conviction as an accessory to a crime/offence (...)”.

⁹³Ambos affirms that: “(...) an arrangement is also preferable to the current Article 28 of the Rome Statute: The literal application of the Rome Statute would entail negligence liability for intentional acts, a construction which is not only logically impossible (...) compatible with the principle of guilt. *De lege lata* the only way out of this logical impasse consists in the creation of a separate offence of ‘failure of proper supervision’ which certainly deserves a much more lenient punishment than the superior’s intentional omission to prevent his or her subordinates from committing international crimes (...)”.

⁹⁴Federal Ministry of Defence, ZDv 15/2, Law of Armed Conflict Manual par. 1524–25 (2013): “(...) ‘learns about occurrences’ strongly insinuates actual knowledge about the occurrences (...)”. See also the Federal Ministry of defence, Commander’s handbook: Legal bases for the operation of naval forces, 2002

command responsibility in a unique way.

In 2009, Germany arrested the former head and deputy of the Democratic Forces for the Liberation of Rwanda and charged them with a series of international crimes related to the conflict in the Democratic Republic of Congo. The indictment included charges based on their superior position as military commanders, including approval of punitive operations against the civilian population (Rafti, 2006).⁹⁵ After a first-instance conviction, the two men appealed.⁹⁶ The Federal Court of Justice overturned their conviction on the charges that were based exclusively on command responsibility, thus upholding other charges as well.⁹⁷ An earlier decision from the Federal Court of Justice upheld the arrest warrant, which contained informative language addressing the *mens rea* of the International Criminal Code.

⁹⁵Bundegerichtshof [BGH] [Federal Court of Justice] 20 December 2018, 3 StR 236/17, par. 3, 26–29 (F.R.G.): https://www.bundesgerichtshof.de/EN/Home/homeBGH_node.html, (Accessed on 24.09.2025): “(...) Rwanda has been plagued with a bloody civil war since the early 1990s, peaking in the widespread massacre of hundreds of thousands of members of the Tutsi tribe by the rival Hutus in 1994. The Tutsis eventually overturned the pro-Hutu government, and advocates of the Hutu government fled to the nearby Republic of Zaire (today the Democratic Republic of the Congo) (...) Democratic Forces of the Liberation of Rwanda was founded to coordinate efforts to retake power in Rwanda. The activities of the Democratic Forces of the Liberation of Rwanda included defensive and retaliatory operations against opposing factions, including against civilians who the Democratic Forces of the Liberation of Rwanda perceived as supporting or encouraging the enemy (...)”.

⁹⁶Bundegerichtshof [BGH] [Federal Court of Justice] 20 December 2018, 3 StR 236/17 (F.R.G.).

⁹⁷Bundegerichtshof [BGH] [Federal Court of Justice] 17 June 2010, AK 3/10 (F.R.G.).

The decision was based on Article 4 of the Code, which equated the responsibility of a commander with that of the original perpetrator, requiring actual knowledge on the part of the commander. Military commanders were knowingly responsible and allowed their subordinates to commit crimes.⁹⁸ The decision thus confirmed that paragraph 2, set forth in conjunction with paragraph 15, required a form of awareness for a crime that excluded negligence as a valid basis for liability.⁹⁹ The court's decision, within the framework of the ICC Statute and German law, was not fully approved.¹⁰⁰

The opposite is evident thanks to Germany's membership in the ICC Statute¹⁰¹ and the legislative and judicial practice that confirmed effective knowledge of the criterion of command responsibility under current German law. These are forms of *mens rea* that were applicable in the form of lesser, diminished responsibilities that entailed a liability that respected the

⁹⁸Bundegerichtshof [BGH] [Federal Court of Justice] 17 June 2010, AK 3/10 (F.R.G.), op. cit., par. 35: "(...) Vorschrift werden militärische und zivile Vorgesetzte wie ein Täter der von ihren Untergebenen begangenen Straftaten nach dem Völkerstrafgesetzbuch bestraft, wenn sie diese Straftaten bewusst geschehen lassen (...)".

⁹⁹Bundegerichtshof [BGH] [Federal Court of Justice] 17 June 2010, AK 3/10 (F.R.G.), op. cit., parr. 39-40: "(...) Gegensatz zur völkerstrafrechtlichen Vorgesetztenverantwortlichkeit reicht im Rahmen des § 4 VStGB auch für militärische Vorgesetzte somit Fahrlässigkeit nicht aus (...)".

¹⁰⁰Bundegerichtshof [BGH] [Federal Court of Justice] 17 June 2010, AK 3/10 (F.R.G.), op. cit., par. 42: "(...) Die Regelung des Völkerstrafgesetzbuchs bleibt damit hinter derjenigen nach Art. 28 iStGH-Statut zurück (...)".

¹⁰¹Germany, international Criminal Court: Assembly of States Parties to the Rome statute.

principal perpetrator.¹⁰²

The Australian case

Australia has had a post-World War II legacy of jurisprudence, with a series of trials and proceedings stemming from the Australian military court during the period 1945-1951, involving Japanese, Taiwanese, and Korean defendants (Morris, 2019). The trials concerned command responsibility and addressed it through five Japanese military officers for atrocities committed by their subordinates (Tamura & Stockwin, 2020).

The trials highlighted the influence of the earlier Yamashita case. In that case, some of the commanders repeated the form of an original indictment (Boas & Lee, 2016; Tamura & Stockwin, 2020).¹⁰³

The five defendants were convicted of pre-established charges based on a specific condemnation of the absence of written decisions during the proceedings. The notes of the UN War Crimes Commission and the judge at the tribunal's headquarters provided various interpretations.¹⁰⁴

¹⁰²German international Crimes Code, op. cit.

¹⁰³Tamura and Stockwin affirmed that: “(...) unlawfully disregarded and failed to discharge his duty as such Commander to control the conduct of the members of his command whereby they committed brutal atrocities and other high crimes (...)”.

¹⁰⁴United Nations war crimes community, op. cit., par. 60: “(...) Masao was found guilty for the death of hundreds of prisoners of war in the course of forced marches in extreme conditions (...) reliance on a theory of negligence, there was determinative evidence that Masao was aware of the severe conditions the prisoners experienced (...)”.

The case of Lieutenant General Baba Masao is recalled, in which the commission recognized the mens rea for command responsibility and the intent to commit a crime of criminal negligence. This is conscious negligence for the crimes. The judge's words were to prove that:

“(...) that war crimes were committed as a result of the accused's failure to discharge his duties as a commander, either by deliberately failing in his duties or by culpably or willfully disregarding them, regardless of whether this resulted in the commission of a war crime or not (...)”.

Negligence was also evident in the Major General Hirota case, who was criminally liable for the mistreatment and murder of civilians and prisoners of war by his subordinates. This was culpable negligence, which the court considered separately and in the context of the circumstances that existed at the time of the crime.

Negligence was demonstrated by evidence and by military knowledge regarding the extent and extent of the protection exercised, which makes negligence substantive for punishment (Boas, Lee, 2016).¹⁰⁵ This line of reasoning has also been expressed in other command responsibility trials.¹⁰⁶

¹⁰⁵United Nations war crimes community, op. cit., par. 148: “(...) Rabaul R172 trial report of Major General Hirota Akira (...)”. Boas and Lee affirmed that: “(...) focus on the commander's duties was necessary when the commander was held accountable due to “reckless disregard” rather than “positive intention (...) the reckless type of mens rea, the Military Court was advised to consider the scope of commander duties and what was reasonably required to exercise those duties in context of the relevant circumstances (...)”.

¹⁰⁶United Nations war crimes community, op. cit., par. 150-151: “(...) the trial of General Hatazō Adachi, who was convicted of murder and ill-treatment of prisoners

Australia's interpretation of command responsibility for the post-World War II period followed a path toward criminal liability through criminal negligence. Subsequent developments point to a more rigorous path toward effective and constructive knowledge. Australia also acceded to the ICC Statute.

The examples of Germany and the United Kingdom determined that adherence to the Rome Statute was not necessary to adopt the legal precepts of the state's domestic law.

Australia incorporated international crimes into its Criminal Code, and the statute's formulation of command responsibility¹⁰⁷ incriminated a commander who knew that a subordinate was committing and/or about to commit a crime.¹⁰⁸ The Australian construction of the Criminal Code required that the commander knew and was reckless in assessing the forces that were committing or where about to commit such crimes (Guilfoyle, 2020).¹⁰⁹

A specific definition in the Criminal Code had to do with the term “reckless”.¹¹⁰ A person could be reckless as a result of a circumstance that involved awareness of a substantial risk, and

of war under his command (...) the trial of General imamura, who was convicted of responsibility for murder, torture, mutilation of bodies and other war crimes his subordinates committed (...).”

¹⁰⁷Australia, international Criminal Court: Assembly of States Parties to the Rome statute (11 March 2003), <https://asp.icc-cpi.int/states-parties/western-european-and-other-states/australia> Accessed on 24.09.2025.

¹⁰⁸UK Manual, op. cit., par. 16.36.6; 2010 AK 3/10, op. cit., par. 40. See Criminal Code Act 1995 (Cth) ch 8 (Austl.).

¹⁰⁹Criminal Code Act 1995, op. cit., par. 268.115.

¹¹⁰Criminal Code Act 1995, op. cit., par. 5.4.

that the outcome and circumstances occurred and/or will occur despite the awareness that the risk was unjustified.

Recklessness is not equivalent to negligence, and such awareness involved an unjustified risk. Recklessness cannot be confused with a mental state, which was previously defined in the Criminal Code and treated separately.

Australia followed the *de jure* choice of substituting the element of negligence in a previous case law for a mental state that was restricted to recklessness.¹¹¹ A mental state was also included and maintained as a standard under the statute of the ICC (Guilfoyle, Kyriakakis, O'Brien, 2022).¹¹²

In recent years, Australian forces have considered this act necessary within the legal framework. Especially after its tenure in Afghanistan (Brangwin, 2010), the Australian government faced allegations of criminal misconduct by special forces deployed against Afghan citizens (Oakes, Clark, 2017; Reuters, 2017).

¹¹¹Australian Defence Headquarters, ADDP 06.4, Law of Armed Conflict, par. 13.5–6 (2006):<https://www.defence.gov.au/adfwc/documents/doctrinelibrary/addp/addp06.4-lawofarmedconflict.pdf>. Accessed on 24.09.2025. Criminal Code Act 1995, op. cit., par. 1.12.

¹¹²Guilfoyle, Kyriakakis, O'Brien affirmed that: "(...) this test of recklessness is an attribution to the defendant of a subjective awareness that a substantial risk exists and their going ahead with a choice of action or inaction despite such awareness (...) the person is cognizant or conscious of something. Some have interpreted this to furthermore require that the relevant knowledge is consciously recalled at the critical moment. This standard is not met where the commander, objectively speaking, should have known of such a risk but, in fact, did not (...)".

The allegations were laid by Major General Paul Brereton.¹¹³ A report analyzing the conduct of Australian special forces in Afghanistan from 2005 to 2016, focusing on allegations of unlawful killings and inhuman and unlawful treatment of detainees, determining the evidentiary basis for criminal investigations. Sections of the report address the responsibility of military commanders for the operations in question.

In several cases, the report recommended a criminal investigation based on command responsibility for the crime of murder. Command responsibility in the Brereton report began with the Australian national codification of command responsibility in the Criminal Code.¹¹⁴

International and Australian jurisprudence in the field of command responsibility perceives the following as elements of criminal command responsibility:

“(...) knowledge, or reckless indifference to, the actual or imminent commission of the offenses (...)”.

The objective of the Brereton report was to identify the commander's knowledge and reckless indifference to war crimes. The investigation was based on criminal mental states among patrol units that exonerated higher command levels such as platoon, squadron, and headquarters of the Joint Task Force

¹¹³Inspector-General of the Australian Defence Force, Afghanistan inquiry Report (2020), <https://afghanistandinquiry.defence.gov.au/> Accessed on 24.09.2025.

¹¹⁴Brereton Report, op. cit., par. 274-276.

and Joint Operations Command. There is no analysis of the prevailing standard of reckless indifference according to the Brereton report. It seems useful to consider that the case law uses legal terminology that was absent in contemporary legislation.

Regarding the squadron, the Brereton report observed that the irregularity of the forces' conduct could be shared and sensationalized, as a perception that is insufficient and precise to provide knowledge, information, even the suspicion that civilians were killed. It is noted that three levels of knowledge seem to imply a subjective test that considers the commanders' actual knowledge. An alternative objective test could ask what a reasonable commander suspected based on the hunch he had even before entering the squadron. This objective test fell within the scope of actual knowledge.

The Brereton Report was only engaged in a lengthy investigative process in the first phase (Taucher, Aszkielowicz, 2021). The legal framework and criteria for command responsibility placed limits on subjective and actual knowledge, as well as on imputing constructive knowledge based on diminished liability modalities such as negligence.

Israel

An initial report entitled "Israel's Mechanisms for Examining

and Investigating Complaints and Claims of Violations of the Laws of Armed Conflict According to International Law” was received by the Israeli Prime Minister on 6 February 2013 (Turkel and others, 2011; Turkel and others, 2013). This report was based on investigations conducted by a special commission of inquiry, appointed by the Israeli government. Its chairman was Jacob Turkel, a former Israeli Supreme Court judge.

Several independent observers reviewed the commission's report before its publication.¹¹⁵ According to Turkel's report, the legislative and administrative framework governing allegations and related LOAC violations was examined. The report analyzed the framework for addressing LOAC violations in a manner comparable to that of other national jurisdictions and in line with the requirements and elements established by international law.¹¹⁶

Among the issues addressed was the Turkel report and command responsibility. The commission sought to determine Israel's international legal obligations regarding command responsibility and the mechanisms that were consistent with these obligations. The report referred to the Additional Protocol to the Geneva Conventions and the duty of commanders to

¹¹⁵Turkel Report, op. cit., parr. 21-29.

¹¹⁶Turkel report, op. cit., parr. 31-32: “(...) concluded that israel’s mechanisms “generally comply with the obligations of the state of Israel under the rules of international law” but saw fit to provide several recommendations to further improve those mechanisms, or to make sure that their practice is adequately codified in written policy and legislation (...)”.

repress violations by their subordinates.

Articles 86-87 of the Additional Protocol to the Geneva Conventions were based on customary international law. In particular, Article 86 highlighted the psychological element and the responsibility of commanders who were in possession of information that could clarify who committed a violation. The Turkel report also referred to command responsibility as well as the Statute of ICTR and the Statute of Rome.¹¹⁷ The Turkel report concluded that commanders have a duty to examine and investigate violations related to the LOAC without submitting a final declaration of knowledge, which was required of the commander.¹¹⁸

The Turkel report examined command responsibility as a matter that needed to be integrated into Israel's national system. It found that case law confirmed commanders' duty to respect the law and address violations without identifying a precise legal codification of command responsibility. According to par. 369, it was stated that:

“(...) Enacting provisions that impose direct criminal liability on military commanders and civilian superiors for offenses committed by their subordinates, where the former did not take all reasonable measures to prevent the commission of offenses or did not act to bring the matter to the competent [sic] authorities when they became aware of the offenses *ex post*

¹¹⁷Turkel Report, op. cit., par. 90: “(...) “knew or had reason to know” standard (...)”.

¹¹⁸Turkel Report, op. cit., par. 90.

facto (...)."

Some recommendations in the Turkel report were made by the Israeli Ministry of Justice, which has undertaken an ongoing process to be implemented. The recommendations were on command responsibility. The implementation report reported that the Military Advocate General of the Israel Defense Forces (IDF) was evaluating the possibilities of integrating command responsibility into national legislation. It was noted that existing legislation allowed for commanders to be held accountable for:

"(...) under certain circumstances (...) legal questions pertaining to basic principles of criminal law in Israel (...)"¹¹⁹

The related implementation report concluded and argued that the research recommended and perceived certain legislation to be implemented as soon as possible.

This report did not provide details regarding the pre-existing legislation. It envisaged the liability of commanders and/or of superiors in general. The Turkel report highlighted the previous commission of inquiry and its mandate to directly address the

¹¹⁹Report of the team for the review and implementation of the second report of the Public Commission for the examination of the maritime incident of 31st May 2010 regarding Israel's mechanisms for examining and investigating complaints and claims of violations of the law of armed conflict according to international law (August, 2015). <https://www.lawandisrael.org/wp-content/uploads/Topics/Gaza/MaviMarmara/Report-on-implementation-of-2nd-Turkel-Report.pdf>. Accessed on 24.09.2025. Press Release, Israel Prime Minister's Office, Security Cabinet Approves Recommendations of the Ciechanover Team on Evaluating and implementing Part ii of the Turkel Commission Report on israel's Examination and investigation Mechanisms (3 July 2016), <https://www.gov.il/en/departments/news/spoketirke1030716>. Accessed on 24.09.2025.

issue of vicarious liability.¹²⁰

In September 1982, after the civil war in Lebanon, a group of Christian militants entitled “Phalangists” entered Muslim refugee camps in western Beirut. They massacred hundreds of inhabitants (Herzog, 2005). The IDF forces, as well as the control of the entire region, were part of an operation entitled “Peace for Galilee,” which had the main objective of limiting attacks from Lebanon towards Israel.¹²¹

The IDF forces within the massacre zone and their own affiliation raised questions regarding their own liability.¹²² The Israeli government established a commission of inquiry into the facts and causes of atrocities in the refugee camps. The Kahan Report, according to the former President of the Supreme Court and also president of the commission, was published on 8 February 1983. Its conclusions attributed indirect responsibility to senior military and political superiors, who were able to

¹²⁰Report of the Commission of inquiry into the events at the refugee camps in Beirut 2-3 (8 February 1983).

¹²¹Israel State Archives, Government Deliberations on the Establishment of the Kahan Commission and Acceptance of its Conclusions, Murder of Emil Grunzweig, 10 Feb. 1983, Subchap. B (21 February 2013): <https://catalog.archives.gov.il/chapter/establishment-of-state-comission> (Accessed on 24.09.2025): “(...) prime minister Menahem Begin’s official communication regarding the need for a full in-depth examination of Israel’s connection with the massacre (...)”.

¹²²Meeting Protocol D/1983 of Government, iSA-PMO-GovernmentMeeting-00119av (28 Sept. 1982), at 48–9, <https://www.archives.gov.il/archives/Archive/0b0717068031be30/File/0b0717068212cdf8/item/0907170682e16c70> Accessed on 24.09.2025.

mitigate acts of violence without success.¹²³

The Kahan Report established that responsibility should be applied according to information regarding imminent atrocities. The report went on to clarify that this principle reflected an ethical, moral, and legal standard.¹²⁴ The Kahan Report acknowledged that legal responsibility was applied according to the legal regime of the occupied territory.¹²⁵ Israeli domestic law left legal enforcement to its own authorities (Shany, Michaeli, 2002).

The Kahan Report, as well as the report's key figures, defined those responsible and dismissed them from their positions.¹²⁶ The Turkel and Kahan Reports acknowledged the assessment of commanders' responsibility for their subordinates who violate international law. Both reports highlighted that Israel took a clear legislative stance regarding the legal expectations of commanders and its own legal boundaries regarding legal

¹²³Report of the Commission of inquiry into the events at the refugee camps in Beirut, op. cit., parr. 44–65, 68–69.

¹²⁴Report of the Commission of inquiry into the events at the refugee camps in Beirut, op. cit., parr. 69-70: “(...) function as a commission of inquiry to lay a precise legal foundation for such indirect responsibility (...) accounts for the main course of action the commission suggested for the culpable figures, which was removal from their positions (...)”.

¹²⁵Report of the Commission of inquiry into the events at the refugee camps in Beirut, op. cit., parr. 69-70: “(...) found that certain persons bear responsibility for these shortcomings, it is fitting that the appropriate conclusions be drawn in their regard (...) accordance with the appropriate provisions of the military legal code, or in some other manner (...)”.

¹²⁶Turkel Report, op. cit., par. 277, 368–69. Report of the Commission of inquiry into the events at the refugee camps in Beirut, op. cit., parr. 37–38.

violations that are committed by its subordinates.¹²⁷

South Korea

South Korea, a non-ICC country, has chosen to depart from Article 28 of the ICC Statute (Ambos, 2022),¹²⁸ that is, the formulation of a standard relating to command responsibility. The codification of command responsibility in South Korean law was similar to the German system.

The classic form of command responsibility was also found in Article 5 of South Korean law as a punishment for crimes under the jurisdiction of the ICC.¹²⁹ This provision criminalized a commander or any other superior who failed to take measures to prevent his subordinates from committing crimes that were contemplated at the time the commander was aware of his actions. The commander could be subject to punishment. This provision was limited to the commander's actual knowledge and did not cover criminal prosecution based on negligence and/or

¹²⁷HCI 7195/08 Abu Rahme v. Military Advocate General 63(2) PD 325, par. 50 (2013) (isr.):<https://www.hamoked.org/document.php?dID=Documents2063>, (Accessed on 24.09.2025): "(...) a report analyzing legal aspects of iDF military operation, the israeli State Comptroller highlighted the need to also properly define the legal treatment of commanders who failed to take reasonable measures to prevent subordinate misconduct (...)".

¹²⁸Republic of Korea, international Criminal Court: Assembly of States Parties to the Rome statute (11 March 2003), <https://asp.icc-cpi.int/states-parties/asian-states/republic-of-korea> Accessed on 24.09.2025.

¹²⁹Act on Punishment of Crimes under Jurisdiction of the international Criminal Court art. 5 (2011).

constructive knowledge (Hyun Choi, Kim, 2011).¹³⁰

Article 15 of Korean law separately codified the failure to perform a duty based on the commander's negligence.¹³¹ Article 15, par. 1 concerns the lack of conscious prevention (Hyun Choi, Kim, 2011).

Article 15, par. 2 imposed liability on the commander who negligently failed to prevent a contemplated crime. The German legal framework provided and limited the punishment for this type of crime as well as the imputation of the punishment for the principal crime committed by one's subordinate.¹³²

Article 15, par. 3 referred to the information of the authorities of crimes committed by subordinates as well as the penalty for failure to perform a duty of five years, according to Article 15, par. 2. This article, however, did not expressly specify the *mens rea* that required one's conviction but explicitly provided for actual knowledge (Hyun Choi, Kim, 2011).¹³³ The South Korean

¹³⁰Hyun Choi and Kim affirmed: “(...) *mens rea*, by eliminating the second leg of mental elements in Article 28, (i.e., “should have known” and “consciously disregarded information”) Article 5 of the Act leaves no room for negligence-based superior responsibility to intervene. Consequently, in the Korean criminal law context where there are two categories of omission classified on the basis of *mens rea*, (i.e., “omission by intent” and “omission by negligence”), the command responsibility under Article 5 has no other option but to fall into the former. Put differently, what Article 5 of the Act requires is that a commander/superior intentionally fails to prevent the crimes by subordinates despite his knowledge thereof (...)”. Criminal Act art. 14 (2020).

¹³¹Act on Punishment of Crimes under Jurisdiction of the international Criminal Court, op. cit., art. 15.

¹³²The punishment is capped at five years. Act on Punishment of Crimes under Jurisdiction of the international Criminal Court, op. cit., art. 15(2).

¹³³Criminal Act, op. cit., art. 14.

guidelines recognized command responsibility within this framework and did not delve into criminal elements.¹³⁴ The applicable case law in the Korean context was pending, and the legislative framework was unequivocal and respected actual knowledge as the standard for command responsibility.

Actual knowledge

In several states, a trend toward a standard of constructive knowledge regarding the matter of command responsibility has been established. The ratification of the ICC Statute, among these states, was an important reality. Its ratification served as a preliminary indication of acceptance of the legal standards for the statute, including command responsibility under Article 28 (Ambos, 2022).

Countries such as Australia, Germany, and South Korea, although signatories to the ICC Statute, chose to distance themselves from it and isolate the traditional context of command responsibility to the commander who had some form of knowledge and awareness of the actions of his subordinates.¹³⁵

The United Kingdom signed the Statute of Rome and

¹³⁴Republic of Korea, Military Operations Law of War Compliance Regulation, Regulation No. 525-8 (1 Nov. 1993).

¹³⁵German international Crimes Code, op. cit., par. 4. Criminal Code Act 1995, op. cit., par. 268.115 (Australia). Act on Punishment of Crimes under Jurisdiction of the international Criminal Court, op. cit., par. 5.

implemented legislation relating to Article 28. The implementation guidelines, coupled with the ambiguity of the term used, precluding a positive conclusion under the term of constructive knowledge. Israel provided a country that explicitly incorporated command responsibility.

The cases were limited and prompted Israel to address the issue, which led to general approval of the adoption of a legal standard emerging in its own future. The United States demonstrated a tradition addressing command responsibility.¹³⁶

Treatment was the basis of a conflicting standard of a government management. The guidelines promote a standard of constructive knowledge. The legislation codifies this standard exclusively for the American military commission, which had jurisdiction. Case law is central to postwar trials.¹³⁷ It relies on specific factual knowledge that holds commanders accountable through constructive knowledge.¹³⁸

The same was true for the American military.¹³⁹ The cumulative

¹³⁶Mobilx Ltd. v. Commissioners for Her Majesty's Revenue and Customs. Wilson v. Peter Vassallo Ltd., op. cit., R v. Rimmington, op. cit.

¹³⁷Turkel Report, op. cit., par. 369.

¹³⁸United States v. von Leeb et al., op. cit., parr. 549, 555. United States v. MILCh, op. cit., parr. 774-777, 875. United States v. Pohl et al., op. cit., par. 110, at 1011. United States v. List et al., op. cit., par. 1271 (the Hostage case).

¹³⁹See for example: Ugolovnyĭ Kodeks Respubliki Belarus [GK RB] [Criminal Code] Art. 137(1) (Belarus, incriminating a commander only for intentional (Umyshlennoye) failure); C.Pén., art. 136septies(5) (Belgium, there is knowledge (connaissance) of the crimes or their initiation); Kazneni Zakon [Criminal Code] Art. 96, 71-05-03/1-11-2, 26 Oct. 2011 (Croatia, is limited in the negligent command responsibility to a penalty of one to ten years; see also from Croatia art. 27(1), which clarifies: "(...) negligent liability must be explicit in the statute (...)"). Penal Militaire

testimony from sources did not convincingly support the constructive knowledge standard.

The state survey did not exhaust approaches addressing command responsibility. This demonstrates the nature of state practice and *opinio juris*. Those who seek to associate a state with a specific legal basis for legislation issued by other states must consider the entire corpus of legal expressions of the state. States discussed and served as a microcosm that was divergent from states addressing command responsibility. It was important for states requiring a standard of actual knowledge for command responsibility to be equivalent to the principal author.

Code (Military Penal Code) Art. 175 (Democratic Republic the Congo, incrimination of a commander that “tolerates” (ont toléré) crimes of subordinates); Loi du 9 janvier 1985 relative à la répression des infractions graves aux Conventions internationales de Genève du 12 août 1949. Art. 5, 25 Jan. 1985, (Luxembourg, incrimination of commanders “who tolerated” (qui ont toléré) war crimes of their subordinates); Krivični Zakonik, Službeni Glasnik P.C., no. 85, art. 384, 6 Oct. 2005 (Serbia, incrimination of commanders who fail to act when they know (znajući) that their subordinates are carrying out a crime); Code Pénal Militaire [CPM] [Military Penal Code] Art. 114a, 13 June 1927, RS 101 (Switzerland, limitation of commanders’ liability in cases of negligence to three years or an equivalent monetary penalty); Kryminal’nyy Kodeks Ukrainy [BBP] [Criminal Code] Art. 426 (Ukraine, incrimination of commanders for intentional (Umysne) failure to stop subordinates’ crimes). See also from Argentina: Ministerio de Defensa, Manual de Derecho internacional de los conflictos armados, 39 (2010) (Argentina, incrimination of commanders responsibility for subordinates’ crimes if they knew (conocimiento) that they are perpetrating them); Comando Conjunto de las fuerzas armadas, Manual de derecho internacional humanitario (2016): (Ecuador, stating that a commander will be liable for knowing (conciendo) of impending crimes of subordinates and failing to report); Ministère de la Défense, Secrétariat Général Pour L’Administration, Manuel de Droit des conflits armés, chapter R (France, commanders liable for knowingly (sciemment) allowing subordinates to commit crimes); Chief of Staff of the Armed Forces of the Philippines, Strict Adherence to the Doctrine of Command Responsibility, Directive (4 Feb. 2007) (Philippines, holding commanders accountable if they had knowledge of subordinates’ crimes but failed to act despite such knowledge).

For other states, the standard was ambiguous and did not provide precise support for the commander's knowledge.¹⁴⁰ The reference to the broad standard of constructive knowledge held commanders accountable.¹⁴¹ States rarely accumulate a practice: “(...) both extensive and virtually uniform (...) sufficiently widespread and representative, as well as consistent (...)” (Liakopoulos, 2020a; Liakopoulos,

¹⁴⁰See for example: Krivični Zakon, Službene novine Federacije BiH, br. 3/2003, art. 180 (Bosnia and Herzegovina: “knew or had reason to know” (lice znalo ili je moglo znati) standard of the ICTY Statute). Karistus-seadustik, RT i 2001, 61, 364, par. 88, 6 June 2001 (Estonia, incrimination of a commander who ordered, consented or failed to prevent subordinates’ crimes); Sakartvelos Siskhlis Samartlis K’odeksi, SSM 41(48), art. 413, 13 August 1999 (Georgia, commanders are liable for subordinates’ crimes if they are caused by the commanders’ inactivity (umokmedobit)). See also: Order of the Minister of Defence on the Adoption of Service Regulations, par. 22(e) (2005). (Hungary, a commander to enforce the law and not tolerate violations of subordinates); Ministère de la Défense Nationale, Forces Armées du Bénin, Le Droit de la Guerre, Fascicule ii, at 19 (1995). (Benin, instructing commanders to take measures to prevent and repress violations); Stato Maggiore della Difesa, Manuale di Diritto Umanitario, SMD-G-014, vol. i, par. 83 (1991) (Italy, Italian law holds individuals accountable for perpetrating or ordering the perpetration of a crime, without discussing command responsibility).

¹⁴¹Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea art. 29 (2001), amended by NS/RKM/1004/006 (27 Oct. 2004), https://www.eccc.gov.kh/sites/default/files/legal-documents/KR_Law_as_amended_27_Oct_2004_Eng.pdf. Accessed on 24.09.2025 (Cambodia, adopting the “knew or had reason to know” standard). Decision on Ieng Sary’s Appeal Against the Closing Order, Case No. 002/19-09-2007-ECCC/OCIJ(PTC75), par. 420, 458 (11 April 2011), https://www.eccc.gov.kh/sites/default/files/documents/courtdoc/D427_1_30_EN.PDF. Accessed on 24.09.2025. Crimes Against Humanity and War Crimes Act, S.C. 2000, v. 24, art. 5(1) (Canada, incriminating a commander who knows “or is criminally negligent in failing to know” of a subordinate’s violation); Rikoslaki SDK 39/1889 [RL], par. 12 (Finland, incriminating a commander who knew or should have known (perusteella pitänyt tietää) that subordinates are committing offenses); Straffeloven, LOV-2005- 05-20-28 [Strl.], par. 109 (Norway, incrimination of a commander who knew or should have known (burde ha visst) that subordinates are committing offenses); implementation of the Geneva Convention Act 8 of 2012, § 6 (South Africa, holding commanders guilty of an offence if they knew or “ought to have reasonably known” of the offense); Ley 18.026 du 25 septiembre 2006 Cooperación con la Corte Penal internacional en Materia de Lucha Contra el Genocidio, los Crímenes de Guerra y de Lesa Humanidad [Law 18.026 of 25 Sept. 2006 on

2020b).¹⁴².

Command responsibility is based on *mens rea*, negligence, and constructive knowledge, which lacks the scope and scope of a practice that requires and establishes the customary norm of international law.¹⁴³ This practice limits and favors the constructive knowledge that accompanies the *opinio juris*, which expresses the legal obligation that supported this standard.

Command responsibility is lacking, as is the foundation of customary law. There is a state practice of the *opinio juris* that recognizes the legal obligation that holds commanders responsible for crimes committed by their subordinates by ascertaining who was guilty and responsible.¹⁴⁴ There is no sufficient and consistent state behavior with the extension of command responsibility, which goes beyond the traditional modalities of criminal liability for serious crimes as well as the intentionality of form and actual knowledge (Damaška, 2001;

Cooperation with the international Criminal Court regarding Fight against Genocide, War Crimes and Crimes against Humanity], D.O. 4 oct/006-27091, art. 10 (Uruguay, stating that commanders are responsible if they would have known (hubiere Sabido) of subordinates' crimes).

¹⁴²North Sea Continental Shelf (F.R.G./Den.; F.R.G./Netherlands), op. cit., par. 74. ILC, Michael Wood (Special Rapporteur), Fifth Report on identification of Customary international Law, op. cit., parr. 28-31. ILC Draft Conclusions, op. cit., par. 135.

¹⁴³See Asylum Case (Colom./Peru), op. cit., par. 276. ILC Draft Conclusions, op. cit., par. 137.

¹⁴⁴Dod Manual, op. cit., par. 18.23.3.2; UK Manual, op. cit., par. 16.36; German LOAC Manual. Brereton Report, op. cit., par. 1.10, 3.03; Turkel Report, op. cit., par. 369.

Nersessian, 2006; Martinez, 2007; Ohlin, 2021).¹⁴⁵

The conviction of a commander for a war crime is based exclusively on constructive knowledge, which is untenable under customary international law. The current customary basis for command responsibility is based on actual knowledge.

Customary law on command responsibility. Universal jurisdiction

Constructive knowledge, as an incrimination for the commander, is based on customary international law that concludes and influences the exercise of criminal jurisdiction by a state. The state has the right to use criminal proceedings to uphold the rule of law of its domestic jurisdiction,¹⁴⁶ given that its subjects enjoy fundamental rights through its own proceedings.¹⁴⁷

¹⁴⁵According to Nersessian: “(...) no concept stretches traditional notions of individual criminal responsibility as far as superior or command responsibility for criminal conduct by underlings (...)”. Martinez affirms that: “(...) command responsibility doctrine has been dogged by the criticism that it seemingly allows commanders to be punished in the absence of the conscious wrongdoing usually associated with moral culpability (...) there are justifications for imposing a duty of knowledge on the commander (...)”. Damaška affirms that: “(...) acknowledge that commanders are responsible for failing to prevent or punish, they leave the nature of this responsibility unspecified (...)”. Ohlin affirms that: “(...) produces an odd result to make a negligent actor guilty of a crime-even as an accessory-that usually requires a much higher mental element such as intent and knowledge (...)”.

¹⁴⁶U.N. Charter art. 2, par. 7; *The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116, 136 (1812): “(...) jurisdiction of courts is a branch of that which is possessed by the nation as an independent sovereign power (...)”.

¹⁴⁷U.S. Constitution. amend. V; Convention for the Protection of Human Rights and Fundamental Freedoms art. 6, 4 Nov. 1950, 213 U.N.T.S. 222 (European Convention on Human Rights); international Covenant on Civil and Political Rights, Art. 14, 16 Dec.1966, T.i.A.S. 92-908, 999 U.N.T.S. 171.

Command responsibility is based on constructive knowledge. This does not necessarily violate the rights of a state that has discretion in the exercise of sovereignty against external interference (Crawford, 2012; Spiermann, 2015).¹⁴⁸

Obviously, the analysis is not the same when a state attempts to exercise jurisdiction over another state and/or a citizen of another state. The attempt activates state's protection against foreign intervention in its affairs, and when the attempt seeks to arrest an official for another state (Jamnejad, Wood, 2009).¹⁴⁹ A forceful exercise of jurisdiction also includes the arrest and detention of a foreign citizen which risks triggering the prohibition as a basis against the use of force (Jamnejad, Wood, 2009; De Wet, 2004; Pobje, 2024).¹⁵⁰

From the interstate exercise of jurisdiction, command responsibility arises when a state A seeks to prosecute a citizen

¹⁴⁸Crawford affirms that: “(...) sovereignty involves a monopoly of governing authority (...) what the law of the state shall be on any matter and how (or when) it is to be enforced (...)”.

¹⁴⁹G.A. Res. 2131 (XX), Declaration on the inadmissibility of intervention in the Domestic Affairs of States and the Protection of Their independence and Sovereignty, par. 1 (21 Dec. 1965).

¹⁵⁰U.N. Charter art. 2, par. 4: “(...) shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations (...) an underlying reason for establishing the international Criminal Tribunal for the former Yugoslavia and the international Criminal Tribunal for Rwanda under Chapter Vii of the U.N. Charter, which empowers the Security Council to legitimize use of force to maintain peace and security (...)”. S.C. Res. 827, par. 4 (25 May 1993); S.C. Res. 955, par. 2 (8 Nov.1994); Jamnejad, Wood affirmed that: “(...) measures taken or authorized by the UN Security Council under Chapter Vii of the Charter do not contravene the prohibition on the use of force or the principle of non-intervention (...)”.

of state B based on universal jurisdiction. Thus, universal jurisdiction is a concept of international law that allows states to exercise jurisdiction over serious violations of international law in the absence of a connection between the violation and the state exercising its jurisdiction (Hill, 2022).¹⁵¹

Universal jurisdiction applied and associated with the concept of lawfare employs legal instruments that achieve political, military objectives (Dunlap, 2016; Trachtman, 2016; Guilfoyle, 2019).

Lawfare was susceptible to universal jurisdiction due to its unique potential for independent prosecution and prosecution across personal and geographical borders (Simons, Chifu, 2001; Kissinger, 2001; Yee, 2011; Scharf, 2012; Cancian, 2018).¹⁵² Several states have measured safeguards and integrated universal jurisdiction, reducing the risk of its abuse (Patrick, 2014).¹⁵³

¹⁵¹Princeton Project on Universal Jurisdiction, the Princeton principles on universal jurisdiction, 23–24 (Stephen Macedo ed., 2001). ILC, Report on the Work of its Seventieth Session, U.N. Doc. A/73/10, at 307 (2018). Trial international, Universal Jurisdiction Annual Review (2020).

¹⁵²Scharf affirms that: “(...) universal jurisdiction-even an indictment-can enable one state to intimidate and harass another state or its officials as a form of “lawfare” (...).” Cancian affirms that: “(...) element of lawfare is the notion of “universal jurisdiction”, which allows states or international organizations to claim criminal jurisdiction over an accused person regardless of where the alleged crime was committed, and regardless of the accused’s nationality or country of residence (...).” Yee affirms that: “(...) the exercise of universal jurisdiction may infringe, or at least detract from, the principle of sovereignty and sovereign equality and is easily subjected to political abuse including discrimination as manifested in selective prosecution, thus destabilizing international relations (...).”

¹⁵³Police Reform and Social Responsibility Act 2011 v. 13, § 153 (Great Britain): <https://www.legislation.gov.uk/ukpga/2011/13/section/153>, (Accessed on

From a procedural perspective, the unintended side effect of international legal discourse does not in itself underscore a fundamental principle. Thus, states guarantee the legal standard that applies universal jurisdiction cases that properly derive from customary international law and legal theories that are controversial, innovative, and do not reflect the *lex lata*.

The exercise of universal jurisdiction is based on and applies the conservative standard, which is controversial with actual constructive knowledge. This approach guarantees universal jurisdiction exercised validly. This disproves accusations of the exercise of jurisdiction amounting to unlawful intervention and the use of force against the state and the defendant's origin.

Judges apply legal principles that transgress customary international law, which risks implicating the nation-state in an internationally wrongful act that invokes state responsibility.¹⁵⁴

24.09.2025): "(...) the consent of the Director of Public Prosecutions for any arrest warrant based on a private complaint for a grave breach of the Geneva conventions (...)" HM Government, Note on the investigation and prosecution of crimes of universal jurisdiction, 2018: "(...) the procedural steps necessary to activate universal jurisdiction (...)". Ministry of Foreign Affairs and Cooperation, Contribution of Spain on the Topic, entitled: The Scope and Application of the Principle of Universal Jurisdiction" (22 Feb. 2016), www.un.org/en/ga/sixth/71/universal_jurisdiction/spain_e.pdf Accessed on 24.09.2025.

154A state is at fault for an internationally wrongful act when it breaches an international obligation. Such an international obligation "may be established by a customary rule of international law." ILC, Report on the Work of its Fifty-Third Session, U.N. Doc. A/56/10, at 55 (2001), par. 35, 55: "(...) cases precisely defined conduct is expected from the state concerned; in others the obligation only sets a minimum standard above which the state is free to act (...) final judicial decision as a possible example of conduct that is "proscribed by an international obligation" (...) in a criminal case of command responsibility, a judicial decision should apply a "minimum standard" of actual knowledge to avoid "a final judicial decision" that

The events and scenarios in the Russian-Ukrainian case have raised many concerns about command responsibility (Sandhu, 2022; Quènivet, 2022; Benedek and others, 2022).¹⁵⁵ In the future, we will see whether criminal cases will be straightforward and accountable, thus promoting accountability and avoiding controversial and unstable legal bases.

Invoking the ICC

States cannot exercise jurisdiction over foreign nationals and impose command responsibility. International tribunals such as the ICC share the mandate to handle their cases. The ICC has encountered difficulties in applying command responsibility. It has not reached conclusive case law in its area (Sandhu, 2022).¹⁵⁶

In recent years, entities have exercised jurisdiction over foreign nationals by imposing command responsibility. The ICC has

could entail an internationally wrongful act (...)”. See also Protocol Additional of the Geneva Conventions, in particular art. 75(4)(c): “(...) one shall be accused or convicted of a criminal offence on account of any act or omission which did not constitute a criminal offence under the national or international law to which he was subject at the time when it was committed (...)”.

¹⁵⁵ICC, Situation in Ukraine: ICC Judges issue Arrest Warrants against Vladimir Vladimirovich Putin and Maria Alekseyevna Lvova-Belova, international Criminal Court (17 Mar. 2023), <https://www.ICC-cpi.int/news/situation-ukraine-ICC-judges-issue-arrest-warrants-against-vladimir-vladimirovich-putin-and> (Accessed on 24.09.2025): “(...) there are reasonable grounds to believe that Putin bears individual responsibility for war crimes as well as superior responsibility (...)”.

¹⁵⁶See also the report of OSCE: <https://www.osce.org/files/f/documents/f/a/515868.pdf> (Accessed on 24.09.2025): “(...) the doctrine of command responsibility as an applicable framework, but noting that no relevant perpetrators have been identified as of yet (...)”.

shared the mandate to handle their cases. The ICC has encountered difficulties in applying command responsibility. However, it has not reached conclusive case law in its area (Sadat, 2018).¹⁵⁷

The ICC has gone through a general legitimacy crisis, including controversial cases (Simons, 2019; Guilfoyle, 2019; Owiso, 2020)¹⁵⁸ on judicial integrity (Lingsma, 2019; Heller, 2019), cases on the environment and toxic work,¹⁵⁹ on complaints about inefficiency, overreach and failure to prioritise (Simons, 2019; Cox, 2020).

There is no quick fix for all ills (Ambos, 2021; Dutton & Sterio, 2022)¹⁶⁰ as part of the solution that makes judicial reasonableness the capacity to produce sustainable jurisprudence

¹⁵⁷Sadat affirms that: “(...) regard to the Bemba case, that “the result in this case is deeply unsatisfying”. The inability of the Appeals Chamber to achieve consensus means that the judgment actually decided very little, and the two points it did decide remain hotly contested (...)”.

¹⁵⁸Statement of ICC Prosecutor, Fatou Bensouda, on the Judgment of the ICC Appeals Chamber Acquitting Mr Jean-Pierre Bemba Gombo, International Criminal Court (13 June 2018), <https://www.ICC-cpi.int/Pages/item.aspx?name=180613-OTP-stat> Accessed on 24.09.2025.

¹⁵⁹ICC, independent Expert Review of the international Criminal Court and the Rome Statute System: Final Report, ICC-ASP/19/16, at 67–68 (30 September 2020).

¹⁶⁰Independent Expert Review of the international Criminal Court and the Rome Statute System, op. cit., 331-344. According to Ambos: “(...) ICC investigation into the Russian-Ukrainian conflict has provided an opportunity to bolster the legitimacy of the court, considering that it has garnered support from state parties across the board, including in the form of a referral by over forty states (...)”. Statement of ICC Prosecutor, Karim A.A. Khan QC, on the Situation in Ukraine: Receipt of Referrals from 39 States Parties and the Opening of an investigation, international Criminal Court (2 March 2022), <https://www.ICC-cpi.int/news/statement-ICC-prosecutor-karim-aa-khan-qc-situation-ukraine-receipt-referrals-39-states> Accessed on 24.09.2025.

based on legal precepts. The ICC abandons rule-making that extends jurisdiction, which encounters a negative reaction from various stakeholders (Akande, 2019; Guilfoyle, 2020; Sekulow & Ash, 2020; Blinken, 2021).¹⁶¹

The ICC wishes to modify legitimacy as part of a lost credibility. This is an important line of action that withdraws from a judicial legislative process that returns to a foundation that delimits the norms recognized in customary international law (Petersen, 2017).¹⁶²

The context of command responsibility, according Art. Article

¹⁶¹Guilfoyle affirms that: “(...) decision to exercise jurisdiction over Myanmar, which is not a party to the Rome Statute, and stating that the decision “had the effect of extending the reach of an already over-stretched court (...)”. Sekulow, Ash affirmed that: “(...) the exercise of jurisdiction over U.S. nationals when the United States is not a party to the Rome Statute is illegitimate overreach; see also American Servicemembers’ Protection Act, 22 U.S.C. par. 7427, which grants the U.S. president the authority “to use all means necessary and appropriate” to release U.S. and allied officials detained in relation to ICC proceedings (...)”. State of Israel, Office of the Attorney General, The international Criminal Court’s Lack of Jurisdiction over the so-called “Situation in Palestine” (20 December 2019), which is affirmed that: “(...) exercise of jurisdiction over israeli officials in the “Situation in Palestine” is legally untenable and exceeds the confines of the Rome Statute (...)”. Statement by Andrew Murdoch, Legal Director to the international Criminal Court Assembly of States Parties, at its 17th Session in the Hague, GOV.UK (5 Dec. 2018), <https://www.gov.uk/government/speeches/uk-statement-to-icc-assembly-of-states-parties-17th-session> (Accessed on 24.09.2025), which is affirmed that: “(...) Court has no mandate, and no jurisdiction, nor will it ever have nearly enough capacity, to act as a human rights monitoring organisation for the whole world. It must focus on its core and essential task, set out under the Statute (...)” United States anti-ICC sentiment peaked when the Trump administration imposed sanctions on the ICC prosecutor and two other ICC officials. The Biden administration has since rescinded the sanctions but stated that it maintains its forceful objections to ICC actions in relation to the United States and the “situation in Palestine” (...)."

¹⁶²Petersen affirms that: “(...) the ICJ strives to maintain legitimacy to avoid the hazard of non-compliance, and one way to do so is to ensure that the identification of customary rules “stands on firm methodological grounds (...)”.

29 of the ICC Statute,¹⁶³ limits the customary criterion of actual knowledge. The ICC reconciles the customary criterion with the wording of Article 28 regarding “ought to have known”. Examples of state behavior are not an impossible task. Contributing to and improving the perception of the ICC, as a competent institution for cooperation between states without violating international obligations, is worthwhile.

The legal consequences of the Ukrainian conflict can provide evidence of the approach to the work of the ICC Prosecutor and the judges.¹⁶⁴

Conclusion

Command accountability, as a fundamental tool, determines responsibility for atrocities committed by forces under

¹⁶³Art. 22(2) of the Rome Statute. Prosecutor v. Ngudjolo Chui, ICC-01/04-02/12-4, Concurring Opinion of Judge Wyngaert, par. 19 (18 Dec. 2012): “(...) drafters wanted to make sure that the Court could not engage in the kind of “judicial creativity” of which other jurisdictions may at times have been suspected. Moreover, this principle is an essential safeguard to ensure both the necessary predictability and legal certainty that are essential for a system that is based on the rule of law (...)”.

¹⁶⁴Statement of the ICC Prosecutor, Karim A.A. Khan QC, on the Situation in Ukraine: “I have Decided to Proceed with Opening an investigation,” international Criminal Court (28 February 2022), <https://www.ICC-cpi.int/news/statement-ICC-prosecutor-karim-aa-khan-qc-situation-ukraine-i-have-decided-proceed-opening> (Accessed on 24.09.2025); Statement of the ICC Prosecutor, Karim A.A. Khan QC, at the Arria-Formula Meeting of the UN Security Council on “Ensuring Accountability for Atrocities Committed in Ukraine, international Criminal Court (27 April 2022), <https://www.ICC-cpi.int/news/statement-ICC-prosecutor-karim-aa-khan-qc-arria-formula-meeting-un-security-council-ensuring> (Accessed on 24.09.2025). Situation in Ukraine: ICC Judges issue Arrest Warrants against Vladimir Vladimirovich Putin and Maria Alekseyevna Lvova-Belova, international Criminal Court (17 Mar. 2023), <https://www.ICC-cpi.int/news/situation-ukraine-ICC-judges-issue-arrest-warrants-against-vladimir-vladimirovich-putin-and> Accessed on 24.09.2025.

responsible command. Accountability does not require or rely on the physical perpetrator, but rather on the ability to supervise and intervene, an essential component of international criminal justice.

Doctrine revolves around the level of knowledge expecting the commander to behave toward his subordinates. The commander thus assumes the role of supervisor and authority, the responsibility of managing his own conduct for his subordinates. The commander performs a complex task, and the reasons for hostility are numerous.

Judicial institutions are isolated and aware of the constant challenges they present to their commanders, and their legal expectations. This approach, given the current state of the law, seems to assume a position for international law that develops state's path. Their position represents a legal status for states. States thus shape their own behavior developing thus and creating customary international law.

Custom seeks to determine the practice of *opinio juris* and of state law. The assessment establishes that customary law does not support the standard of constructive knowledge that imposes criminal command responsibility. As a standard of actual knowledge, command responsibility enjoys widespread and solid national application.

The implications are relevant to the prosecution of a foreign

national for command responsibility, and a national and international court such as the ICC violates customary law by applying a standard of constructive knowledge that constitutes an internationally wrongful act and an unlawful intervention and use of force to the foreign national subjected to forced custody.

The standard of constructive knowledge, based on a solid basis of customary law, undermines the legitimacy and professional credibility of a judicial institution according to necessary characteristics.

The judicial institution must address command responsibility as a contemporary application of law and as a standard of actual knowledge that resists attempts to progressively develop and compromise the integrity of a judicial process.

References

- Akande, D. (6 May 2019). ICC Appeals Chamber Holds that Heads of State Have No Immunity Under Customary International Law Before International Tribunals. *EJIL:Talk!*: <https://www.ejiltalk.org/icc-appeals-chamber-holds-that-heads-of-state-have-no-immunity-under-customary-international-law-before-international-tribunals> Accessed on 24.09.2025.
- Amann, D.M. (13 June 2018). In Bemba and Beyond, Crimes Adjudged to Commit Themselves, *EJIL:Talk!*: <https://www.ejiltalk.org/in-bemba-and-beyond-crimes-adjudged-to-commit-themselves/> Accessed on 24.09.2025.
- Ambos, K. (2012). Superior Responsibility. In A. Cassese, P. Gaeta, J.R.W.D. Jones, *The Rome statute of the International Criminal Court*. Oxford University Press, Oxford, 823, 826ss.
- Ambos, K. (3 November 2021). The Return of “Positive Complementarity”, *EJIL:Talk!*: <https://www.ejiltalk.org/the-return-of-positive-complementarity/> Accessed on 24.09.2025.
- Ambos, K. (2021). *Treatise on International Criminal Law: Foundations and general part*. Oxford University Press, Oxford, 132-133ss.
- Ambos, K. (2022a). *Rome statute of the International Criminal Court*, Hart/Beck/Nomos, Cheltenham, Baden-Baden.
- Baram, G. (24 November 2021). Why Do Governments Reveal Cyber Intrusion?, *Lawfare*: <https://www.lawfareblog.com/why->

[do-governments-reveal-cyber-intrusions](#) Accessed on 24.09.2025.

Benedek, W. and others (12 April 2022). Report on violations of international humanitarian and human rights law, war crimes and crimes against humanity committed in Ukraine since 24 February 2022. *Relief web*:
<https://reliefweb.int/report/ukraine/report-violations-international-humanitarian-and-human-rights-law-war-crimes-and-crimes-against-humanity-committed-ukraine-1-april-25-june-2022> Accessed on 24.09.2025.

Bigart, H. (23 September 1971). Medina Found Not Guilty of All Charges on Mylai. *New York Times*:
<https://www.nytimes.com/1971/09/23/archives/medina-found-not-guilty-of-all-charges-on-mylai-medina-cleared-of.html>
 Accessed on 24.09.2025.

Blinken, A.J. (2 April 2021). U.S. Secretary of State, Ending Sanctions and Visa Restrictions against Personnel of the International Criminal Court. *State Government*:
<https://www.state.gov/ending-sanctions-and-visa-re-trictions-against-personnel-of-the-international-criminal-court/> Accessed on 24.09.2025.

Boas, G., Lee, L. (2016). Command Responsibility and Other Grounds of Criminal Responsibility. In G. Fitzpatrick and others. *Australia's war crimes trial*. ed. Brill, Bruxelles, 146ss.

- Brangwin, N. (10 July 2010). Australia's Military Involvement in Afghanistan Since 2001: A Chronology, Parliament of Australia. *Army War College Press, Australia*: <https://press.armywarcollege.edu/cgi/viewcontent.cgi?article=3119&context=parameters> Accessed on 24.09.2025.
- Cancian, M.F. (2018). Coping with surprise in great power conflicts. *Center for Strategic and International Studies-CSIS*: <https://www.csis.org/analysis/coping-surprise-great-power-conflicts> Accessed on 24.09.2025.
- Cassese, A. and others, (2013). *Cassese's international criminal law*. Oxford University Press, Oxford, 42ss.
- Cheah, W.L., Vormbaum, M. (2018). British War Crimes Trials in Europe and Asia, 1945–1949: A Comparative Study. *Leiden Journal of International Law*, 31, 672ss.
- Cherif Bassiouni, M. (2013). *Introduction to International Criminal Law*. ed. Brill, Bruxelles, 332-373.
- Corn, G. and others, (2019). *National security law. Principles and policy*. Wolters Kluwer, The Hague.
- Cox, B.L. (20 June 2020). The ICC Wants Justice But Has No Mandate. *Just Security*: <https://www.justsecurity.org/71015/the-icc-wants-justice-but-has-no-mandate/> Accessed on 24.09.2025.
- Crawford, E., Pert, A. (2024). *Introduction to humanitarian law*. Cambridge University Press, Cambridge.
- Crawford, J. (2012). *Brownlie's Principles of public*

- international law*. Oxford University Press, Oxford, 6, 20-21.
- Crawford, J. (2012). Sovereignty as a Legal Value. In J. Crawford, *The Cambridge Companion to International Law*. Cambridge University Press, Cambridge, 117, 120-121.
- CRS Report (2020). U.S. Killing of Qasem Soleimani: Frequently asked questions, 2: <https://www.congress.gov/crs-product/R46148> Accessed on 24.09.2025.
- Damaška, M. (2001). The Shadow Side of Command Responsibility. *American Journal of Comparative Law*, 49, 455, 462-467.
- De Wet, E. (2004). *The Chapter VII powers of the United Nations Security Council*. Hart Publishing, Oxford, Oregon, Portland, 341-342.
- Dinstein, Y. (2007). *The Interaction Between Customary International Law and Treaties*. Recueil des cours, ed. Brill, Bruxelles, vol. 243, 316ss.
- Dunlap, C.J. (2011). Lawfare Today...and Tomorrow. *International Law Studies*, 87, 315.
- Dutton, Y., Sterio, M. (30 August 2022). The War in Ukraine and the Legitimacy of the International Criminal Court. *Just Security*: <https://www.justsecurity.org/82889/the-war-in-ukraine-and-the-legitimacy-of-the-international-criminal-court/> Accessed on 24.09.2025.

- Eckhardt, W.G. (1982). Command Criminal Responsibility: A Plea for a Workable Standard. *Military Law Review*, 97, 1, 19ss
- Eudes, M., Ryfman, P., Szurek, S. (2019). *Droit et pratique de l'action humanitaire*, LGDJ, Paris.
- Ferren, J.M. (2003). General Yamashita and Justice Rutledge. *Journal of Supreme Court History*, 28, 55ss.
- Fleck, D. (ed.). (2021). *The Handbook of International Humanitarian Law*, 4th ed., Oxford University Press, Oxford.
- Fletcher, G.P. (1998). *Basic concepts of criminal law*. Oxford University Press, Oxford, 84-85.
- Grant, J.P. (2010). *International law essentials*. Edinburgh University Press, Edinburgh, 11ss.
- Guilfoyle, D. (2019). Lacking Conviction: Is the International Criminal Court Broken? An Organisational Failure Analysis. *Melbourne Journal of International Law*, 20, 401, 432-434.
- Guilfoyle, D. (2019). The Rule of Law and Maritime Security: Understanding Lawfare in the South China Sea. *International Affairs*, 95, 999, 1006ss.
- Guilfoyle, D. (23 November 2020). Australian War Crimes in Afghanistan: The Brereton Report, *EJIL:Talk!*: <https://www.ejiltalk.org/australian-war-crimes-in-afghanistan-the-brereton-report/> Accessed on 24.09.2025.
- Guilfoyle, D., Kyriakakis, J., O'Brien, M. (2022). Command Responsibility, Australian War Crimes in Afghanistan, and the

Brereton Report. *International Law Studies*, 99, 220, 259.

Headquarters, *Department of the army, headquarters, United States marine corps, FM 6-27/MCTP 11-10C, The Commander's on the law of land warfare* (2019): https://armypubs.army.mil/epubs/DR_pubs/DR_a/pdf/web/ARN19354_FM%206-27%20_C1_FINAL_WEB_v2.pdf Accessed on 24.09.2025.

Heinze, A. (18 June 2018). Some Reflections on the Bemba Appeals Chamber Judgment. *Opinio Juris*: <https://opiniojuris.org/2018/06/18/some-reflections-on-the-bemba-appeals-chamber-judgment/> Accessed on 24.09.2025.

Heller, K.J. (19 March 2019). Judge Ozaki Must Resign-Or Be Removed. *Opinio Juris*: <http://opiniojuris.org/2019/03/29/judge-ozaki-must-resign-or-be-removed/> Accessed on 24.09.2025.

Herzog, C. (2005). *The Arab-Israeli Wars: War and Peace in the Middle East*. Pen and Sword Books, 351-353.

Hill, J. (13 January 2022). German Court Finds Syrian Colonel Guilty of Crimes Against Humanity. *BBC*: <https://www.bbc.com/news/world-europe-59949924> Accessed on 24.09.2025.

Hill, J.T. (2015). Jus in Bello Futura Ignitus: The United States, the International Criminal Court, and the Uncertain Future of the Law of Armed Conflict. *Military Law Review*, 223, 672, 692-693.

Howard, K.A. (1973). Command Responsibility of War Crimes. *Yale Law Journal*, 82, 1274ss.

Hrnčirik, V. (2006). Actus Reus and Mens Rea (Thabo Meli and Beyond). *Common Law Review Prague*, 8, 2ss.

Human Rights Watch, (3 April 2022): Ukraine: Apparent War Crimes in Russia-Controlled Areas. *Human Rights Watch*: <https://www.hrw.org/news/2022/04/03/ukraine-apparent-war-crimes-russia-controlled-areas> Accessed on 24.09.2025.

Hyun Choi, T., Kim, S. (2011). Nationalized International Criminal Law: Genocidal Intent, Command Responsibility, and an Overview of the South Korean Implementing Legislation of the ICC Statute. *Michigan State International Law Review*, 37, 589, 619ss.

Jamnejad, M., Wood, M. (2009). The Principle of Non-intervention. *Leiden Journal of International Law*, 22, 345, 372-37.

Kissinger, H.A. (2001). The Pitfalls of Universal Jurisdiction. *Foreign Affairs*, 80, 86, 88.

Kittrie, O.F. (2016). *Lawfare: Law as Weapon of war*. Oxford University Press, Oxford, 12ss.

Liakopoulos, D. (2019a). *The function of accusation in International Criminal Court. Structure of crimes and the role of Prosecutor according to the international criminal jurisprudence*, ed. Maklu, Antwerp, Portland.

Liakopoulos, D. (2019b). Rough justice: Anatomy and interpretation in the exclusion of individual criminal liability in international criminal justice. *Revista do Curso de Direito do UNIFOR*, 10(1), 148-233.

Liakopoulos, D. (2019c). Justicia dura: anatomia e interpretaciòn en la exclusiòn de la responsabilidad penal individual en la justicia penal internacional. *Revista Eletrònica de Estudios Penales y de la Seguridad*, 4.

Liakopoulos, D. (2020a). *The role of not party in the trial before the International Court of Justice*. ed. Maklu, Antwerp, Portland.

Liakopoulos, D. (2020b). *Complicity of States in the international illicit*. ed. Maklu, Antwerp, Portland.

Liakopoulos, D. (2024). *The role of Prosecutor in the function of accusation in International Criminal Court*, Eliva Press, Republic of Moldova.

Lingsma, T. (2019, 16 May 2019). ICC Judges at Centre of Controversy. *Justiceinfo.Net*:

<https://www.justiceinfo.net/en/41447-icc-judges-at-centre-of-controversy.html> Accessed on 24.09.2025.

Marston Danner, A., Martinez, J.S. (2005). Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law. *California Law Review*, 93, 75, 102-103.

Martinez, J.S. (2007). Understanding Mens Rea in Command Responsibility: From Yamashita to Blaškić and Beyond. *Journal of International Criminal Justice*, 5, 639ss.

Morris, N. (2019). Japanese War Crimes in the Pacific: Australia's Investigations and Prosecutions. *National Archives of Australia*:
<https://www.naa.gov.au/help-your-research/research-guides/japanese-war-crimes-pacific-australias-investigations-and-prosecutions>, (Accessed on 24.09.2025), 145ss.

Nersessian, D.L. (2006). Whoops, I Committed Genocide! The Anomaly of Constructive Liability for Serious International Crimes. *Fletcher Forum of World Affairs*, 30, 81, 82ss.

Oakes, D., Clark, S. (11 July 2017). The Afghan Files. *ABC News*:
<https://www.abc.net.au/news/2017-07-11/killings-of-unarmed-afghans-by-australian-special-forces/8466642?nw=0&r=HtmlFragment> Accessed on 24.09.2025.

Ohlin, J.D. (2021). Complicity, Negligence, and Command Responsibility. *Temple International & Comparative Law Journal*, 47, 109, 113-120.

Owiso, O. (23 December 2020). Remuneration Debacle at the International Criminal Court: Should ICC Judges Get a Pay Rise? Part I, *Opinio Juris*:
<http://opiniojuris.org/2020/12/23/remuneration-debacle-at-the-international-criminal-court-should-icc-judges-get-a-pay-rise->

[part-i/](#) Accessed on 24.09.2025.

Parks, W.H. (1973). Command Responsibility for War Crimes. *Military Law Review*, 62, 1, 2-19.

Patrick, S.M. (14 February 2014). Spain's Welcome Retreat on Universal Jurisdiction. *Council on Foreign Relations*: <https://www.cfr.org/blog/spains-welcome-retreat-universal-jurisdiction>. Accessed on 24.09.2025.

Petersen, N. (2017). The International Court of Justice and the Judicial Politics of Identifying Customary International Law. *European Journal of International Law*, 28, 357, 364-366.

Pigaroff, D.K., Robinson, D. (2021). Article 30. Mental Element. In K. Ambos, *The Rome Statute of the International Criminal Court*. C.H. Beck, Munich.

Pobje, E. (2024). *Prohibited force. The meaning of "use of force" in international law*. Cambridge University Press, Cambridge.

Quénivet, N. (30 March 2022). Command Responsibility and the Ukraine Conflict, Articles of War. *Lieber Institute*: <https://lieber.westpoint.edu/command-responsibility-ukraine-conflict/> Accessed on 24.09.2025.

Rafti, M., (2006). South Kivu: A Sanctuary for the Rebellion of the Democratic Forces for the Liberation of Rwanda. *Institute of Development Policy*.

Reel, A.F. (1950). *The Case of General Yamashita*. Indiana

University, Bloomington.

Reuters, (2 September 2017). Australian Military Investigating “Rumours” of Possible War Crimes in Afghanistan. *The Guardian*:

<https://www.theguardian.com/australia-news/2017/sep/02/australian-military-investigating-rumours-of-possible-war-crimes-in-afghanistan> Accessed on 24.09.2025.

Roberts, A., Sivakumaran, S. (2018). The Theory and Reality of the Sources of International Law. In M.D. Evans, *International law*. Oxford University Press, Oxford.

Robinson, D. (2020). *Criminal Law Theory Meets International Criminal Law*. Cambridge University Press, Cambridge, 206-223.

Sadat, L.N. (12 June 2018). Fiddling While Rome Burns? The Appeals Chamber’s Curious Decision in Prosecutor v. Jean-Pierre Bemba Gombo, *EJIL:Talk!*: <https://www.ejiltalk.org/fiddling-while-rome-burns-the-appeals-chambers-curious-decision-in-prosecutor-v-jean-pierre-bemba-gombo/> Accessed on 24.09.2025.

Sandhu, S. (10 March 2022). Putin Bears “Command Responsibility” for War Crimes in Ukraine, Says Human Rights QC Geoffrey Robertson. *INews*: <https://inews.co.uk/news/world/putin-command-responsibility-russia-ukraine-war-human-rights-qc-geoffrey-robertson->

[1509800](#) Accessed on 24.09.2025.

Scharf, M.P. (2012). Universal Jurisdiction and the Crime of Aggression. *Harvard International Law Journal*, 53, 358, 382ss.

Sekulow, J.A., Ash, R.W. (2020). The Issue of ICC Jurisdiction over Nationals of Non-consent- ing, Non-party State to the Rome Statute: Refuting Professor Dapo Akande's Arguments. *South Carolina Journal of International Law & Business*, 16 (2), 26-28.

Shany, Y., Michaeli, K.R. (2002). The Case Against Ariel Sharon: Revisiting the Doctrine of Command Responsibility. *New York University Journal of International Law & Policy*, 34, 797, 817ss.

Simons, G., Chifu, I. (2018). *The changing face of warfare in the 21st century*. Routledge, London, New York.

Simons, M. (20 January 2019). In the Hague's Lofty Judicial Halls, Judges Wrangle Over Pay. *New York Times*: <https://www.nytimes.com/2019/01/20/world/europe/hague-judges-pay.html> Accessed on 24.09.2025.

Simons, M. (12 February 2021). International Court, Battered by Critics, Elects Briton as New Prosecutor. *New York Times*: <https://www.nytimes.com/2021/02/12/world/europe/international-criminal-court-karim-khan.html> Accessed on 24.09.2025.

Simpson, G. (2007). The Death of Baha Mousa. *Melbourne Journal of International Law*, 8, 9ss.

Simpson, G. (2022). Independent report. The Baha Mousa Public Inquiry Report, 6-7:

<https://www.gov.uk/government/publications/the-baha-mousa-public-inquiry-report> Accessed on 24.09.2025.

Solis, G.D. (2021). “Smoothing Out” the IMT Judgment: The Legal Legacy of the Twelve Subsequent Military Tribunals, *Military Law Review*, 229, 205, 214.

Spiermann, O. (2015). General Legal Characteristics of States: A View from the Past of the Permanent Court of International Justice. In C. Chinkin, F. Baetens, *Sovereignty, Statehood and state responsibility. Essays in honour of James Crawford*. Cambridge University Press, Cambridge, 144, 145.

Tamura, K., Stockwin, A. (2020). *Bridging Australia and Japan: The writings of david Sissons. Historian and political scientist*, ANU press, Australia, 105-106.

Taucher, P., Aszkielowicz, D. (22 November 2021). Why Investigating Potential War Crimes in Afghanistan Just Became Much Harder-And Could Take Years. *The Conversation*: <https://theconversation.com/why-investigating-potential-war-crimes-in-afghanistan-just-became-much-harder-and-could-take-years-171412> Accessed on 24.09.2025.

Thirlway, H. (2024). The Sources of International Law. In M.D. Evans, *International law*. Oxford University Press, Oxford, 95, 97.

Trachtman, J.P. (2016). Integrating Lawfare and Warfare. *Boston College International & Comparative Law Review*, 39, 267, 268-269.

Triffterer, O. (2016). Article 28. Responsibility of Commanders and Other Superiors. In O. Triffterer, K. Ambos, *The Rome Statute of the International Criminal Court: A commentary*. Oxford University Press, Oxford, 1056, 1060.

Turkel, J. And others (2013). *Public Commission to Examine the Maritime Incident of 31 May 2010: Israel's Mechanisms for Examining and Investigating Complaints and Claims of Violations of the Laws of Armed Conflict According to International law*:
https://www.gov.il/BlobFolder/generalpage/downloads_eng1/en/ENG_turkel_eng_b1-474.pdf Accessed on 24.09.2025.

Turkel, J. and others, (31 May 2010). *Public Commission to Examine the maritime incident of 31 May 2010*,
https://www.gov.il/Blob-Folder/generalpage/downloads_eng1/en/ENG_turkel_eng_a.pdf, (Accessed on 24.09.2025), 15-16ss.

Ucko, D.H., Egnell, R. (2013). *Counterinsurgency in crisis: Britain and the challenges of modern warfare*. Columbia University Press, Columbia, 45-75.

Van Schaack, B. (3 June 2014). Title 18's Blind Spot: Superior Responsibility. *Just Security*:
<https://www.justsecurity.org/11066/title-18s-blindspot-superior->

[responsibility](#) Accessed on 24.09.2025.

Villiger, M.E. (1997). *Customary international law and treaties: A manual on the theory and practice of the interrelation of source*. Martinus Nijhoff Publishers, The Hague, 27-28.

Walsh, P., Berry, J.F. (2016). Expanding Command Responsibility Beyond War: The Application of the Doctrine of Command Responsibility to Human Rights Law. *Liberty University Law Review*, 11, 423, 426-435.

Weston Janis, M. (2017). Sources in the Meta-History of International Law: A Little Meta-Theory-Paradigms, Article 38, and the Sources of International Law. In S. Besson, J. D'Aspremont, *The Oxford Handbook of the sources of international law*. Oxford University Press, 264, 270-276.

Whitney, C. (1949). *The case of General Yamashita. A memorandum*, Tokyo, 82ss.

Yee, S. (2011). Universal Jurisdiction: Concept, Logic, and Reality. *Chinese Journal of International Law*, 10, 503, 510.